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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1930.

No. 63.

ABIE STATE BANK, APPELLANT,

V.

ARTHUR J. WEAVER, AS GOVERNOR OF THE STATE OF NEBRASKA; CLARENCE G. BLISS, AS SECRETARY OF THE DEPARTMENT OF TRADE AND COMMERCE; WILLIS M. STEBBINS, AS TREASURER, ETC., ET AL.

APPEAL FROM SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF APPELLANTS.

FRANK H. GAINES,
LEONARD A. FLANSBURG,
S. S. SIDNER,
Attorneys for Appellants.

WEKESSER-BRINKMAN CO., Law Briefs, Lincoln, Neb.

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LEONARD A. FLANSBURG,
S. S. SIDNER,
Attorneys for Appellants.

(34,881)

REPORT OF OPINION OF LOWER COURT.

The opinion of the Supreme Court of Nebraska, upon which the judgment sought to be reversed here is based, is found reported in 227 N. W. 922, 119 Neb. 153.

GROUNDS OF JURISDICTION.

The grounds of jurisdiction of this court have been heretofore set forth by separate printed statement filed herein in compliance with paragraph 1 of Rule 12, and are therefore not restated.

SUMMARY STATEMENT OF THE CASE.

This suit was instituted on December 31, 1928, by the Abie State Bank, plaintiff, on behalf of itself and 558 other state banks, all chartered under the laws of the State of Nebraska, to enjoin the defendants, Arthur J. Weaver, governor of the State of Nebraska, and Clarence G. Bliss, secretary of the Department of Trade and Commerce of the State of Nebraska, from collecting special assessments, levied and to be levied, against these banks under the bank Guaranty Law of the State of Nebraska (Rec. pp. 1-21 incl.). The plaintiffs below, the appellants here, in their petition challenged the constitutionality of the statutes of Nebraska, authorizing the levy of such special assessments, under the Fourteenth Amendment of the Constitution of the United States, on the ground that the collection of such assessments constituted the taking of their property by the state without due process of law.

Suit was brought in a state court, the District Court of Lancaster County, Nebraska, where the case was decided in favor of the plaintiffs and an injunction granted. Upon appeal to the Supreme Court of the State of Nebraska that decision was reversed, the injunction ordered dissolved, and from the latter decision appeal is taken here. The total amount of assessments, the collection of which has been prevented by this suit, now amounts to about $4,000,000.00.

The defendant state officers were attempting to collect these assessments under what is known as the Bank Guaranty Law of the State of Nebraska. By the statute state banks were declared to be quasi public institutions. Sec. 7983, Comp. St. of Neb. 1922. Under this law all state banks were subjected to assessment, the proceeds to go into a common fund, and the fund to be used for the payment of the depositors in those banks which should fail, where the assets of the failing banks were insufficient to satisfy in full the claims of their depositors.

The Bank Guaranty Law, enacted in the year 1909, provided that (Sec. 8024, Comp. Stat. Neb. 1922; Laws 1909, p. 87):

> "For the purpose of providing a guarantee fund for the protection of depositors in banks, every corporation engaged in the business of banking under the laws of this state, shall be subject to assessment to be levied, kept, collected and applied as hereinafter provided."

By Section 8025 the banks were required to report to the Department of Trade and Commerce their average daily deposits for each preceding six-months period.

By Section 8026 the Department of Trade and Commerce was required twice each year to levy upon each bank an assessment, each time in the amount of one-twentieth of one per cent of the average daily deposits so reported.

By the provisions of the law (Section 8029, Comp. Stat. Neb. 1922) a failure to pay the assessments authorized the Attorney General to have a receiver appointed. By the amendment of the law in 1925 (Session Laws 1925, Chapter 30, page 122) a failure to comply

with the order of the department authorized the department to take possession of the property and business of the bank and place it in charge of the Guaranty Fund Commission.

By Sections 8031-8033, inclusive, the law provided that in case a bank failed it should be placed in receivership, and the assets of the bank applied to the payment of depositors, and, where insufficient, the court should determine the amount of the deficiency and order the Department of Trade and Commerce to draw against the depositors' guaranty fund in the amount required to make up the deficiency. Claims of depositors are paid according to priority of adjudication.

Prior to the commencement of the suit there were approximately $10,000,000.00 of such adjudicated claims, bearing interest at seven per cent per annum, ordered paid out of the Guaranty Fund. The fund itself was not only exhausted but, with the claims of other depositors against the fund, there was a deficit therein of some $16,000,000.00.

Under the operation of the Guaranty Fund Law, and since 1920, 292 banks had failed prior to the commencement of this suit, the number of failures constantly increasing each year.

By Section 8027 it was provided that when the Guaranty Fund should reach the total of one and one-half per cent of the average daily deposits, all assessments should cease until the fund was depleted below one per cent of such average daily deposits.

By Section 8028, Comp. Stat. 1922, as amended by Section 26, Chapter 191, Laws of 1923, p. 452, it was provided:

> "If the Depositors' Guarantee Fund shall, from any cause, be depleted or reduced to any amount less than one per cent of the average daily deposits * * * the Department of Trade and Commerce shall levy a special assessment * * * not exceeding one-half of one per cent of said average daily deposits in any one year."

The Department of Trade and Commerce, under the authority of Section 8028, last above quoted, the Guaranty Fund not only being completely gone but there being a huge deficit to meet, on December 15, 1928, levied a semi-annual assessment against all the complainant banks of one-fourth of one per cent, such additional semi-annual assessments having also been made regularly for several years past. The result was that the total assessment against each of these banks had become an annual charge in the amount of six-tenths of one per cent of their total average daily deposits. This assessment was at the rate of eight per cent per annum upon the total capital of the banks.

This suit was brought by the plaintiff banks to enjoin the defendant officers from collecting, or attempting to collect, these assessments, or any future assessments thereafter to be levied, on the ground that the law under which such assessments were levied was unconstitutional.

Without setting forth with particularity the issues, the gist of the case, presented by the pleadings (Rec. pp. 1-38, incl.) is as follows:

At the time of the commencement of this suit there were 726 state banks, doing business in Nebraska and

subject to assessment. The charters of 410 of these banks had been granted and such banks had been operating a banking business prior to the enactment, in 1909, of the Bank Guaranty Law. The total capital stock of the 726 existing state banks at the time of the commencement of this suit was approximately $19,000,000.00. The total Guaranty Fund assessment, by reason of special assessments regularly levied, in the aggregate amounts to eight per cent per annum upon that capital. During the period of ten years prior to the commencement of the suit, in addition to what had previously been paid out, the state banks paid into the Guaranty Fund $14,609,000.00. The total paid into the Guaranty Fund was $16,709,842.11. Depositors in failed banks, up to the time of the commencement of this suit, have had the benefit of these current contributions; and yet the fund stood, at the time of the commencement of this suit, with a deficit of $16,000,000.00, which deficit was continually growing in size. The total annual increased assessments against the banks had at last become no more than sufficient to pay the annual interest accruing on the accumulated claims of depositors of failed banks.

Not only was the Guaranty Fund gone, with no hope of replenishment, but the banks themselves, except for a few of the stronger banks, by reason in large part of the burden of these assessments, had their resources depleted to the extent that they could no longer suffer the burden of assessment and continue to do business. Their earnings were insufficient to pay these assessments and to take care of their own operating expenses and meet their own losses, and leave a compensatory return on their investments. For two years prior to the commencement of this suit two-thirds of the banks in the state had been unable to earn or pay dividends. The

burden of assessments did not permit them a compensatory return upon their investments and was confiscatory of their earnings. Those banks chartered prior to 1909, when the bank Guaranty Law was enacted, as well as those banks chartered after its enactment, had, on the strength of their charters, invested in banking buildings and equipment, peculiarly fitted for a banking business, and they could not cease operation of that business without losing in large part the value of those investments. Individuals were prohibited from engaging in such business. None of these banks when chartered, whether chartered before or after the enactment of the law, though, of course, knowing they were subject to reasonable police regulation, could contemplate for the future such unreasonable and burdensome assessments.

The plaintiffs' contention is two-fold:

1. That under these conditions the current assessments against the banks, which deplete their own funds and are used, not for the benefit of their own depositors, but to pay the claims of depositors in banks which had long since failed, now serve no public purpose and bear no rational relation to any public purpose, for the collection of those assessments takes away from the security of present depositors in going banks to pay the depositors in failed banks, and without hope or tendency of furnishing protection to present depositors. Instead of the assessment creating a fund and affording protection to the depositors in going banks, as was its purpose, it directly defeats that object. The operation of the law is injurious to the existing banks and to the protection of their depositors, without benefit or hope of benefit to either, and since it bears no rational relation to their furtherance and welfare, it serves no public

purpose, but benefits only private and individual claimants, and cannot now be justified as a proper police regulation.

2. The assessments, if upheld at all, must be upheld as against all of the banks or none, since they are all brought into a common scheme. 410 of these banks were operating prior to the enactment of this law, their investments were made, and they had no election but to operate under the law or suffer the loss of investments. That is also true of those which were chartered later. The tax, as a police regulation, is unreasonable in that it is oppressive, burdensome, exorbitant and results in confiscation of the earnings and properties of the banks. Though we concede the banks must operate subject to reasonable police regulation, this regulation is now unreasonable.

The defendants, appellees here, aside from denials of plaintiffs' allegations, contend that the decision of this court in the cases of *Noble State Bank* v. *Haskell*, 219 U. S. 104, 55 L. ed. 112, and *Shallenberger* v. *First State Bank of Holstein*, 219 U. S. 114, 55 L. ed. 117, are decisive of the issues here and are *res adjudicata* of the questions involved.

The case of *Shallenberger* v. *First State Bank of Holstein*, was the case brought in behalf of the Nebraska banks in the first instance, in 1909, attacking the validity of the Bank Guaranty Law, and the decision in that case was rendered upon the strength of the decision in *Noble State Bank* v. *Haskell*.

The decisions in those cases, it is our contention, were rendered upon a basis of the supposed operation of the law and prior to experience under it, and we contend

the questions of confiscation and the questions of unreasonableness of operation, arising under present conditions, were not and could not have been passed upon in those cases at that time.

The defendants, and appellees here, further contend that the banks, by operation under the law and by advertising the benefits of the law have waived, or are estopped to raise the question of constitutionality.

As to the matter of waiver of rights, the opinion of the Supreme Court of Nebraska is not clear and definite. But what is said about waiver in the opinion is entirely disregarded in the *judgment* entered by the court, and in that judgment the *sole ground* of decision was the question of constitutionality of the law (Rec. p. 58). The judgment of the court controls the opinion.

It is further our contention that a holding that the banks were estopped or had waived their rights is palpably unfounded by the record, both in fact and law. Since the testimony on that subject is without material conflict, the question is resolved entirely as a matter of law.

If the statement in the opinion of the Supreme Court of Nebraska on the question of waiver is taken to mean that the banks in this case have waived their rights, then that conclusion is clearly unfounded and erroneous, upon the undisputed facts in the record, for the reasons that the banks had no election, that their operation under the law was compulsory, that the publicity they gave to the fact that their deposits were protected by the Guaranty Fund of the State of Nebraska were such as the law *expressly* directed they should make, and that the newspaper advertisements of the benefits of the Bank

Guaranty Law were initiated, sponsored and recommended by the state departments, and the material that went into those advertisements was furnished by those departments. Those advertisements were made in 1926, concededly prior to any knowledge on the part of the banks of any serious condition as to the Guaranty Fund.

THE FINDINGS OF FACT BY THE TRIAL COURT HAVE NOT BEEN CRITICIZED NOR MODIFIED BY THE SUPREME COURT OF NEBRASKA IN ITS OPINION, BUT HAVE BEEN INFERENTIALLY ACCEPTED, AND THOSE FINDINGS STILL STAND AS THE UNDISPUTED JUDICIAL FINDINGS OF THE FACTS IN THE CASE.

The record is composed of practically undisputed facts. Upon this record the trial court, the District Court of Lancaster County, Nebraska, made extensive findings of fact and drew its conclusions of law. The Supreme Court of Nebraska has not questioned the findings of fact of the District Court, but drew different conclusions of law. The findings of fact made by the District Court are not only supported by the record, but stand undisputed, uncriticized and unmodified as the record of facts in this case.

The Supreme Court of Nebraska in its opinion does not discuss the confiscatory character of the assessment, nor the question of whether or not the assessment, under present conditions, is unreasonable and serves no public purpose, but passes those questions of fact as if conceding them, and holds that, *nevertheless*, the case is controlled as a matter of law by the former decisions of the Supreme Court of the United States in the cases passing on the Bank Guaranty Law, heretofore referred to.

The only reference made by the Supreme Court of Nebraska in its opinion to the question of confiscation or unreasonableness of the Bank Guaranty Law as a police regulation is as follows (Rec. p. 63):

> "In the present case, the trial court found that the guaranty fund was confiscatory, and that its enforcement constituted the taking of private property without due process, and that there should therefore be an indefinite abatement of the enforcement of the act until such time as such enforcement could be made without mischievous consequences. It may be observed, *however*, that the bank guaranty fund law has been held by the highest court in the land to be a constitutional act and well within the meaning of the federal Constitution.
>
> "Substantially like questions as here involved were considered and decisions were rendered by the Supreme Court of the United States in *Noble State Bank* v. *Haskell*, 219 U. S. 104, and *Assaria State Bank* v. *Dolley*, 219 U. S. 121, and in both cases it was held that the act was not repugnant to the provisions of the Constitution."

The Supreme Court of Nebraska thus entirely ignored and gave no heed to the change of conditions which had come about through operation under the law during the twenty years which has elapsed since the decision on the Bank Guaranty Law by the Supreme Court of the United States. These changed conditions were the gist of our action. If it had not been for changed conditions, conditions, in fact, diametrically opposed to the conditions upon which the decision of the Supreme Court of the United States was based, this suit would not have been brought.

The trial judge, after three weeks' trial and after listening to all of the evidence, made a full and careful

analysis of the evidence and extensive findings of fact. They are embodied in his memorandum opinion (Rec. p. 41), and decree (Rec. p. 39). These were not criticized but inferentially accepted by the Supreme Court.

In the findings set forth in the memorandum opinion, which are incorporated in the court's decree by reference (See *Rosaly* v. *Graham Y. Frazer*, 227 U. S. 584, 57 L. ed 655), the trial court, referring to an extensive table of figures on earnings of the banks in 1927 and 1928 declared (Rec. pp. 44, 45, 46, 50):

> "The significant thing in these figures is that *compensatory* net earnings are confined to a *minority* of the banks. Thus, 176 banks, or 24.24 per cent of the total number earned $1,475,056.50 which was 76.21 per cent of the total earnings of all banks. Hence, less than a fourth earned three-fourths of the total earnings. On the other hand, 156 banks or 21.48 per cent of the total number showed a loss of $558,799.54 and 110 banks, or 56.47 per cent of the total number not only were earnings less than six per cent per annum on their combined capital and surplus as of June 30, 1928, but also show their earnings in the red in the sum of $179,170.79.
>
> "The Department of Trade and Commerce prepared an analysis of operating expense and income of 845 state banks for the fiscal year ending June 30, 1926. This analysis classifies the banks according to capitalization which enables us to locate in a general way the banks with the least earnings; the two groups, one consisting of 206 banks with a capital of from ten to twenty thousand dollars showed a net profit on capital and surplus of 4.17 per cent, while 426 banks with a capital of from twenty to forty thousand dollars showed a net profit of 4.95 per cent. Thus both these classes show earnings of less than 5 per cent. On the other hand, 177 banks

with a capital of from forty to seventy-five thousand dollars earned 6.28 per cent; eighteen banks with a capital of seventy-five to a hundred thousand, 5.90 per cent, while another eighteen banks with a capital of from one hundred to two hundred thousand dollars earned 11.45 per cent. The net profits on capital and surplus for the entire 845 banks was (on an average) 5.924 per cent. It is clear from this table that the smaller banks, which by law must be located in the smaller places, are the ones that are least able to meet the strenuous situation that is being experienced. * * *

"The evidence introduced in this case quite clearly demonstrates that fully two-thirds of the banks under the existing financial conditions are unable, after paying assessments amounting to 8 per cent on their capital, to pay compensatory dividends. The Guaranty Fund Law cannot continue to function except upon the basis of all going state banks meeting its demands. It is based upon mutuality, the co-operation of all. Such banks as cannot respond to those demands must fall by the wayside. How far can this process of elimination be carried without violating the constitutional guaranties against taking private property for private use without compensation?"

These book earnings, as the trial court indicates and as the record discloses, are in fact greater than actual net earnings, for the banks have been unable to charge off losses which would have wiped out earnings, and have been compelled, in an attempt at collection of loans due them, to take real estate, usually on second mortgage, until, at the time this suit was brought, almost $10,000,000 of their capital was represented by such real estate securities, actually representing in large part losses that the banks could not charge off. With reference to this the trial court says (Rec. pp. 45-46):

"Under the heading 'Other Real Estate Owned' the aggregate had increased from $818,514.10 in 1920 to $9,872,647.21 in 1928 * * *; the latter item (Other Real Estate Owned) clearly indicates that there is a large amount of additional assets that should be charged off. It is not a healthy condition to have more than one-third of the banks' capital invested in the frozen assets, 'Other Real Estate.' If the banks had not been required to pay the special assessments they would have been able to charge off part or all of this 'Other Real Estate."

With regard to what dividends the banks have paid, the court said (Rec. p. 49):

"From Exhibit 37, which is the Defendants' compilation relating to 726 banks for eighteen months ending June 30, 1928, we learn something of the dividends paid. This Exhibit is based upon the figures relating to the banks that had survived and is practically the list today of the going banks. From this Exhibit we learn that only 273 banks, or 37.6 per cent of the total number, paid a dividend in 1928 (let us insert here the other 63 per cent paid no dividend in that year nor since); that 124 paid their last dividend in 1927; 30 in 1926; 20 in 1925; 11 in 1924; 9 in 1923; 14 in 1922; 42 in 1921 and 43 in 1920; while 30 reported, paid no dividend since prior to 1920. These figures are somewhat incomplete because 130 do not state when their last dividend was paid. However, it is pretty safe to say that if they had paid any dividend recently they would have reported the fact."

With reference to the *total* amount of yearly assessment the court declared (Rec. p. 48):

"From the figures furnished us by the Department of Trade and Commerce we learn that the total assessments levied upon the 726 banks for the year

1928 amounted to $1,508,360.36. This is almost exactly 8 per cent of the banks' capitalization, which was $19,001,000."

In the court's decree (Rec. p. 39), as to the confiscatory character of the assessments, the court found:

"The court further finds that the special assessment levied against the plaintiff banks under the provisions of Section 8028, Compiled Statutes 1922, which levy was made on December 15, 1928, and which the defendants were taking steps to collect, and that each of the special assessments provided for by said section of the statutes, is, under the facts and conditions shown by the evidence in this case, unjust, oppressive, unreasonable in amount and confiscatory of the earnings and property of the plaintiff bank and of the banks in behalf of whom this suit is brought, as is more particularly shown by the facts, conditions, findings and conclusions set forth in the memorandum opinion filed herein."

With reference to the holding that the assessments no longer served a public purpose, gave no protection to present depositors and, instead of carrying out, defeated the original purpose of the act, the court in its memorandum opinion made findings as follows (Rec. pp. 56-57):

"The total liabilities of the failed banks are $26,400,282.76. The Commission expects to realize out of the assets of these banks $10,451,932.65. Therefore, the deficit is $15,948,350.11. * * *

"The foregoing figures do not take into consideration the condition of the going banks which was discussed in the earlier part of this memorandum. It is quite evident from that discussion that unless some relief is granted the Guaranty Fund, this deficit of fifteen millions plus will be increased rather than decreased, even though all assessments now provided by law are continued indefinitely. We

certainly can expect when the real condition of the Guaranty Fund is known to the depositing public that deposits in state banks will diminish just as they have increased under the more favorable conditions in the past. This in turn will result in lessened returns to that fund.

"The Guaranty Fund, under the conditions existing, is no protection to the present day depositors. As a matter of fact, it is a burden to the banks and just to the extent of that burden makes them less able to meet the demands of their current depositors by keeping their banks solvent."

And in the decree on that subject, the court made the following finding (Rec. pp. 39-40):

"The court further finds, as is more particularly set forth in said memorandum opinion, that owing to the condition of the Guaranty Fund and the fact that there is a deficit in said fund of near $16,000,000.00, that the depositors in existing banks, and the existing and operating banks themselves, now receive no benefit from the payment of such assessments, but that the payment of such assessments must be used to pay, and will be insufficient to meet, the said deficit which now exists in said Guaranty Fund, and that the burden of paying such assessments by the state banks, instead of strengthening the state banking system and protecting depositors of state banks, has just the contrary effect, and, to the extent of the burden imposed by such assessments, makes said banks less able to meet the demands of their current depositors and less able to keep their banks solvent; that the said special assessment is not now being levied for any public purpose, but is being levied for the sole and only purpose of paying claims of depositors in failed banks, which claims have been allowed, and will not and cannot be used for the purpose of creating

a fund for the stabilizing of banking conditions in the State of Nebraska."

None of the foregoing findings of fact are disputed or modified by the Supreme Court in its opinion. The only answer by that court was that this case is controlled by the former decision of the Supreme Court of the United States.

SUMMARY OF THE EVIDENCE, SHOWING THE CONDITION OF THE BANKS, THE CONFISCATORY CHARACTER OF THE ASSESSMENTS AND THE UNREASONABLE OPERATION OF THE LAW UNDER PRESENT CONDITIONS.

Present Status of the Guaranty Fund and Past Contributions by the Banks.

Mr. Van E. Peterson, secretary of the Guaranty Fund Commission, in charge of the files and records of that office, testified that the amount of adjudicated and unadjudicated claims on December 31, 1928, the date this suit was commenced, was $26,400,282.76 (Rec. p. 90, Q. 81); that the value of the assets in the hands of the Commission from failed banks was $10,451,932.65; leaving a deficit in the Guaranty Fund of $15,948,350.11 (Rec. p. 92, Q. 95). Adjudicated claims at that time amounted to $10,536,518.59, and these claims drew interest at 7 per cent from date of adjudication. It is obvious that with accumulated interest the deficit in the Guaranty Fund at the time of the commencement of the suit exceeded $16,000,000.00. Each additional bank failure adds to that deficit. Banks have not been closed until hopelessly insolvent. According to the experience of the Commission (Rec. p. 93, Qs. 99-102) the deficit

is increased by an amount each time of six times the capital stock of the bank that fails.

During the period of operation under the law 292 banks had failed prior to the commencement of the suit. Bank failures have increased each year, and year by year. There were 21 failures in 1922; 24 in 1923; 19 in 1924; 38 in 1925; 36 in 1926; 41 in 1927; 57 in 1928, and failures are continuing. Though it is outside the record, there were 77 failure in 1929 and 26 the first six months of 1930. By reason of the large number of banks that have failed since the commencement of the suit, the deficit has been very largely increased.

The total contribution by the banks to the Guaranty Fund up to the time of the commencement of the suit was $16,709,842.11. Of this amount $14,609,576.65 has been contributed since 1919 (Rec., Exhibit 10, p. 422). State banks have also, in addition to this, contributed to the bankers' conservation fund, for the benefit of the Guaranty Fund, the amount of $541,046.36 (Rec. Exhibit 61, p. 664).

During a period of enormous stress placed upon these banks, requiring their utmost endeavors to keep their own banks open and to protect their own depositors, they have been compelled to contribute these huge amounts to other failed banks.

Condition of the State Banks.

The beginning of the present crisis commenced with the period of general deflation of property values, beginning in about 1920.

In 1920 (Rec. p. 242, Q. 1245) live stock values had dropped 50 per cent; corn, which had been $1.60 to $1.75 a bushel, dropped to 20 cents a bushel; wheat, which

had been $2.00 a bushel, dropped to 60 cents a bushel. Real estate values also suffered a decline although this decline was not immediately felt. The effect of the decline in real estate has continued down to the present time. In fact, the effects of general deflation are still continuing. The testimony of Mr. Bliss, secretary of the Department of Trade and Commerce, was (Rec. p. 200, Qs. 948-949):

948 Q. "You have spoken here of the deflation period?"

A. "I would make that since 1920."

949 Q. "Including the present time?"

A. "Yes, covering the time clear down."

The loss of property values was necessarily reflected in the assets of the banks, in the collateral securing their loans and in other assets held for the protection of depositors. It was a condition for which the banks were not, and could not, have been responsible. Business and properties throughout the state suffered a loss in like character and amount. The loss to depositors is a loss which reflects a cross section loss to every property owner in the state. The farmers lost the equivalent in the value of their cattle and hogs, grain and lands. The depositors lost in the same manner through shrinkage of bank assets. The loss to each was from the same primary cause. Mr. Woods, testifying for the state as an expert, said (Rec. p. 244, Qs. 1252-1253):

1252 Q. "You have testified concerning conditions that affected real estate and other values; what effect did those conditions have on the banks during this period?"

A. "Are you speaking from 1920 to July 1, 1928?"

1253 Q. "Yes, as to the cause of failures and approximate losses?"

A. "Well, it was the last and final cause and the occasion of the greatest number of bank failures the state has ever suffered from. There were other contributing causes, such as individual incompetency and occasionally a betrayal of trust, but those were trivial as compared to the other conditions which caused nearly three hundred banks to fail in Nebraska."

He testified further that another bad condition was the fact that the state had granted charters to too many state bank (Rec. p. 273, Qs. 1415-1416):

1415 Q. "In your opinion, has the state as a whole been over-banked during the last five years?"

A. "Yes."

1416 Q. "It has. And in your opinion is it at the present time over-banked?"

A. "Yes, but not so much so because there has been quite a number of failures, though you can still find plenty of communities having too many banks."

The condition of the state being over-banked was a condition over which the bankers of the state had no control.

Existing Banks Unable To Charge Off Their Own Losses.

From the beginning of this deflation period, the state banks have continued to take losses. They have been unable to make earnings sufficient to pay the Guaranty Fund assessments and to meet the current losses as such losses were realized. As time went on it became necessary to take every character of security that a bank could get to protect its loans, sometimes second or third mortgages on real estate, since there was no other available security.

Mr. Van E. Peterson, secretary of the Guaranty Fund Commission, testified (Rec. pp. 105-106, Qs. 200-201):

200 Q. "Well, in connection with these bad debts arising through real estate and second mortgages you are familiar, from your experience with your Department, as to the circumstances under which the banks acquire that particular class of paper, generally speaking?"

A. "Yes, sir."

201 Q. "You may state what the facts are, in that connection."

A. "We usually find that before the deflation period set in a bank would be carrying a person for a line of indebtedness, sometimes secured and quite often unsecured. When the particular security became insufficient and property values as a whole depreciated, the banker would take any security he could get. Quite often that would be a second mortgage and quite often a third mortgage, to protect himself. Consequently they are not taken as security to the original loan but to the loan already made."

When the time came for the bank to call its mortgage due, money could not be realized to pay the notes from such properties. The banks were required to take over such real estate and hold the equity, which was subject to a first and perhaps a second mortgage, and set up that equity as of the value of the face of the notes secured, a largely fictitious value.

Although such real estate holdings are improper investments for a bank to make, because at the best they are frozen assets and of no immediately realizable value, the banks were forced into this situation.

It is interesting to compare their condition with regard to the real estate item as it existed in 1919, and as it existed at the commencement of this suit in 1928 (Rec. p. 422, Exhibit 10).

In 1919, 937 banks had "other real estate" on their books, valued at $641,450.88. In 1928, the number of banks had been reduced to 726; 137 of the original 937 banks were being operated by the Guaranty Fund Commission, and the other 74 banks had been closed. The 726 banks existing, at the time of the commencement of the suit, had on their books other real estate valued at $9,872,647.21, and the 137 operated by the Guaranty Fund Commission carried the item "Other Real Estate" at $5,879,043.60. It thus appears that, in 1928, 863 of the 937 banks operating in 1919 had a total of $15,751,690.81 carried under the item "Other Real Estate," as against an original $641,450.88 in 1919 for the total 937. The 726 existing banks now carry $9,872,647.21 under that item, "Other Real Estate," but in addition carry "real estate" for bank buildings at $6,174,432.86. The value of this latter item is obviously in large part dependent on ability to profitably continue in business.

In other words, at the time of the commencement of this suit the 726 banks had assets invested in real estate of $16,057,580.17. This value carried on the books was largely in excess of actual value.

Mr. Peterson, secretary of the Guaranty Fund Commission, has had an experience covering many years with the disposal and liquidation of such real estate assets, carried under the denomination of "Other Real Estate," and his experience is that on an average *not more than forty-three per cent* of the value carried on the books

can be realized. Mr. Peterson's testimony was (Rec. p. 116, Q. 285; p. 105, Qs. 194-196):

285 Q. "Now, on these failed banks that came into the control of the Guaranty Fund Commission, what has been the average amount realized from the liquidation of the real estate as compared to the amount at which it was carried?"

A. "Approximately 43 per cent."

194 Q. "To what extent does the item 'real estate' enter into it?"

A. "We have realized on practically four and a half millions of real estate, book value, since I have been in the office. The average book realization has been 42 per cent of the total of the book value."

195 Q. "And the book value, I take it, would be based on the value over and above any incumbrances there might be on it?"

A. "The book value represents the equity only, and it is 42 per cent on the value of that equity which we have realized."

196 Q. "In practically every instance where you have taken over failed banks the interest of the bank in real estate has been an equity, there has been a first mortgage ahead of it?"

A. "That is usually true."

Mr. George W. Woods, of the Lincoln State National Bank, testifying for the state as to the item of "Other Real Estate" said (Rec. pp. 268, 269, 271, Qs. 1386, 1387, 1403):

1386 Q. "Now, calling attention to the report of the same Department for the year, 1927, as of June 30th, that being the last, the item 'other real estate' $13,966,675.86. Note the figure June 30, 1927."

A. "I notice it."

1387 Q. "Does that show a healthy condition of the state banks in Nebraska, or otherwise, in your opinion?"

A. "Otherwise, I should say."

1403 Q. "Now, Mr. Woods, you said that the amount of real estate taken over has created an unhealthy condition. Was the taking over of that real estate the result of the deflation that you described, largely?"

A. "I think largely, yes. There were cases where it couldn't be ascribed to that, but I think largely so."

If the assets carried by the present banks as "Other Real Estate" which are at the best frozen assets, could be liquidated and bring what experience has shown has been the liquidating value of millions of dollars of such assets, 43 per cent on the record value of such properties, the loss in this book item alone would be $5,627,408.91

[redacted] full condition of these banks is not reflected in this one item alone although the one item is sufficient to emphatically indicate the true condition.

The item carried on the books of the banks as "Other Real Estate" to the extent of approximately $[illegible] graphically emphasizes losses which are covered up in such holdings which cannot be charged off.

Ivan V. Stephens, prominent state banker exceptionally well versed in banking conditions of the state testified in behalf of the plaintiffs (Rec. p. 324, Qs. 3294, 3295, 3300):

3294 Q. "And through that period the banks in Nebraska to your knowledge have been cleaning up in one way and another these frozen loans they acquired at that time?"

A. "Only the good banks have been able to do that."

3295 Q. "Well, all of the banks have to some extent?"

A. "I don't think so."

3300 Q. "And practically all of the banks have been making some clean up all the time?"

A. "No, my information is just the reverse,—that only about a third of the banks have been able to clean up their note cases. *The others have used up their earnings to pay the assessments in the Guaranty Fund.*"

The defendants, by Exhibit 37, show total net earnings of the banks for the *18 months period* prior to the commencement of the suit to be $1,935,519.40 (see summary Exhibit 52, Rec. p. 567).

But Mr. Marshall, a deputy of the secretary of the Department of Trade and Commerce, testified as to the necessity of charge-offs during that period, which would have wiped out entirely these total net earnings.

His testimony was that examiners' reports were received at various times throughout the year by the examiners as they examined the banks; some of these reports being given up to as late as the end of the year 1928 and the beginning of 1929, disclosed worthless assets in these banks of $1,001,074.42 (Rec. p. 556, Q. 3581), probable loss on notes, overdrafts, and such items, $2,948,878.10 (Rec. p. 556, Q. 3585); statutory bad debts, paper which has been carried by the banks more than six months after it is due, and demand paper carried by the banks more than a year after it is due, $1,062,625.08 (Rec. p. 557, Qs. 3591-3593). Were the banks able they should have charged off all of these items. This condition, as disclosed by the examiners'

reports, is not refuted in the record. Mr. Bliss offered to make an estimate, off-hand, as to how much, if any, of these amounts have been charged off or adjusted. The court did not allow him to do this without furnishing and definitely testifying from his records, and this, for some reason, he did not see fit to do (Rec. pp. 661-662, Qs. 4296-4303).

This amount does not include whatever charge-offs would be required as to $9,872,647.21 of "real estate" carried by the banks as capital assets, had the banks been able to meet those losses.

Capital Assessments of Stockholders.

The stockholders in 242 of the existing banks, in order to meet capital impairment, have contributed, through stockholders' assessments, the amount of $2,106,682.15 (Rec. p. 153, Q. 558; p. 187, Qs. 863-864).

Mr. Bliss, secretary of the Department of Trade and Commerce, gave this information through his testimony, and stated that there were 160 banks that he had not investigated on that question and did not know whether or not their stockholders had paid assessments to repair capital.

Net Earnings of the Banks Not Allowing for all Deductions to Meet Losses Which Should Be Charged Off.

Owing to the nature of the case it was necessary that such evidence as to the earnings and condition of the banks be used which was practicably available. An individual examination of each bank and banker in the state was prohibitive. Such a trial procedure would have taken years.

The banking department has, as to all these banks and as to each individual bank, information which it has gathered and accumulated from bank reports made under the requirements of the statutes and from its investigations and examinations of the books by bank examiners, and from special reports called for from the banks under authority of statutory power. All of which information has become a matter of official record in that office. From these records there is ample to show that the state banking system is in a critical condition and that the great mass of the state banks of Nebraska have not been able to pay Guaranty Fund assessments and make compensatory returns upon their capital investment.

The state banks are required each four months to publish a statement of their financial condition and to file copies of such published statements with the banking department. The banking department also has required the banks to file reports describing their condition, in answer to certain particular questions put to them. These recorded facts are on file with the secretary of the Department of Trade and Commerce. Statements furnished by the banks and published to the people naturally always put the banks in the most favorable light possible as to financial condition. Incapacity to earn, impairment of capital, valueless assets, are not heralded in such statements. It would be damaging to the bank making such disclosure.

The plaintiffs employed auditors to examine these records and they made a list of all banks earning less than 6 per cent for three consecutive 6 months periods in 1927 and 1928. Mr. Mooney, auditor, employed with

Walker & Fulk, public accountants of Lincoln, Nebraska, made up from these records Exhibits 6, 7 and 8.

His testimony from his examination was that during the period from January 1, 1928, to June 30, 1928 (Rec. p. 134, Q. 369) 353 of the 726 banks showed earnings to each of less than 6 per cent per annum (Rec. p. 135, Q. 380), and that the combined aggregate *net loss* of this class of banks was $356,076.18 (Rec. p. 137, Q. 391), and that these 353 banks contributed to the Guaranty Fund in assessments during that same period $301,006.98 (Rec. p. 137, Q. 392).

During the period from January 1, 1927, to June 30, 1927, he testified that there were 413 banks (Rec. p. 138, Qs. 395-397) of the 726 existing banks, each of which made less than 6 per cent per annum on its capital.

He further testified that, during the period from July 1, 1927, to December 31, 1927, of the 726 existing banks there were 376 (Rec. p. 139, Q. 407; p. 140, Q. 411), each of which received less than 6 per cent per annum earnings.

The defendants on their behalf introduced Exhibit 37, which covered data as to each of the 726 banks during the same 18 months period, taken from the same records of the Department of Trade and Commerce.

On behalf of the plaintiffs, Walker & Fulk, public accountants, made a summary of defendants' Exhibit 37, which is Exhibit 52 (Rec. p. 567).

By this showing it appears that each of 410 of the 726 banks had a net earning of less than 6 per cent per

annum, and that the aggregate total loss to these 410 banks was $179,170.79.

The summary of Exhibit 37, made by Mr. Fulk, shows that of the total earnings of all state banks in Nebraska, 48 banks of the 726, or a little over 6 per cent of the banks, made over 45 per cent of the earnings. It further appears that 176 of the 726 banks, or 24 per cent of the banks in the state, made 76 per cent of the earnings of all of the banks.

The defendants also introduced in evidence Exhibit 39 (Rec. p. 494), showing earnings of banks for the year ending June 30, 1926. By that showing, which covers 845 banks, it appears that 636 banks of the 845 made less than a 5 per cent per annum return (see columns 1 and 2 of the Exhibit).

Dividends Paid By the Banks.

Mr. Bliss, secretary of the Department of Trade and Commerce, testified that practically two-thirds of the banks had paid no dividends for two years prior to the commencement of the suit (Rec. p. 203, Qs. 971-974):

971 Q. "Do you know the number that paid dividends the past year?"
A. "Yes."

972 Q. "How many, don't cite the banks, just give the number."
A. "The number paying in 1928. One-third, not quite one-third."

973 Q. "Of what?"
A. "Of the banks paid dividends."

974 Q. "In 1927?"
A. "Just a fraction over one-third."

Of the two-thirds unable to pay dividends for those two years, 104 paid the last dividend in 1927; 30 in 1926; 20 in 1925; 11 in 1924; 9 in 1923; 14 in 1922; 12 in 1921; 43 in 1920; 30 paid their last dividend at some date prior to 1920, and the record does not disclose as to when the other 130 paid their last dividend.

Condition of Abie State Bank.

The name of Abie State Bank appears first as plaintiff since it was first in alphabetical order on the list.

The record shows the Abie State Bank was organized in 1904, prior to the enactment, in 1909, of the Bank Guaranty Law. Mr. Svoboda has been president of the bank for the last 17 years; part of the time he received $135.00 a month salary as president, most of the time he received $130.00. Certainly salaries were not excessive. In 1904 the bank was organized with a capital of $10,000.00. From earnings from 1910 to 1917, more than 12 years ago, the capital was increased to $15,000.00. In other words, $5,000.00 was added to the capital out of the earnings in 7 years, at the rate of about 7 per cent a year.

The earnings after that time, before paying losses, were as follows (Rec. p. 172, Qs. 712-718): 1922, $475.66; 1923, $315.72; 1924, $1,221.99; 1925, $1,942.32 (Rec. pp. 170-171, Q. 696); 1926, $1,245.51 (Rec. p. 171, Q. 697); 1927, $195.17 (Rec. p. 170, Q. 694), making a total of the earnings *without any deduction for losses* of the bank for these eight years at much less than 6 per cent on the capital investment.

In 1921 and in 1926 (Rec. p. 183, Q. 829) $500.00 each year has been added to the surplus. In 1926 a dividend

of $900.00, or 6 per cent, was paid; aside from this the balance of the earnings of the bank have been absorbed in losses and in payment of assessments to the Guaranty Fund.

All earnings from an insurance and land business, which is carried on by Mr. Svoboda, has been, during his connection with the bank, added to bank earnings. In 1926, when the $900.00 dividend was paid, $806.60 was received by the bank through land commissions and insurance business (Rec. p. 170, Q. 691; p. 169, Qs. 675-678).

In 1928 the net earnings of the bank were $333.05. However, during that year Mr. Svoboda turned in to the bank out of real estate commissions and insurance $587.61 (Rec. p. 169, Q. 683). Except for that earning, the year would have shown a loss of $254.56 on the bank business. $459.00 is also yet due on the assessment to the Guaranty Fund for that year, which if paid would leave the bank with a loss of $256.56 even when it counts in the $587.61 made from an insurance and land business.

During this 8 year period, after 1920, Mr. Svoboda testified the bank had been unable to meet its losses, because its earnings were insufficient; and had been unable to make the charge-offs required by the bank examiner (Rec. p. 179, Qs. 797-798):

> 797 Q. "Have you been able from your earnings to charge out all the paper the examiners requested?"
>
> A. "No, sir."
>
> 798 Q. "Why did you not charge out all that they asked you to?"
>
> A. "Because we didn't have enough profits to charge them off."

Mr. Svoboda testified that there were notes to the extent of $4,000.00 admittedly frozen assets, and upon which he had not even been collecting interest (Rec. p. 173, Q. 736). Also, that the bank held as assets an equity in real estate at $4,800.00, subject to first mortgage.

The deposits of this bank for the year were over $180,000.00, so that the assessments against the bank for the Guaranty Fund would amount to over $1,000.00 a year, an enormous charge to be exacted from such bank.

The Guaranty Fund assessment upon this bank was not only an enormously heavy charge, but what protection or benefit did the bank or its depositors now receive by the payment of such exaction? Over $1,000.00 a year, in other words, was taken away from the security of the depositors of that bank to go not to create a reserve or a fund for the protection of its own depositors, but to pay losses in banks that have failed long ago and where the claims, as adjudicated claims, were then of long standing. The assessments, since they amount to a complete loss to the Abie State Bank, tend to the extent of the assessment to decrease its assets and to that extent endanger the security of its depositors; and from this assessment it, and its depositors, receive absolutely nothing in return.

Oppressive Burden of Assessments.

The Guaranty Fund assessments of six-tenths of one per cent upon deposits, which has now become a regular yearly burden, amounts to a tax upon the banks of 8 per cent upon their capital. An 8 per cent tax is, under any circumstances, an enormous tax. Manifestly

the state banks of Nebraska, as a class, and especially the great majority, at least two-thirds of the banks in this state, are incapable of continuing as banks and at the same time contribute to the enormous assessments aggregating a million and a half of dollars a year to the Guaranty Fund.

The opinion of the secretary of the Department of Trade and Commerce, Mr. Bliss, was expressed that if the assessment was continued *two-thirds of the banks in the state would become insolvent and close.*

Mr. Schantz testified (Rec. p. 303, Q. 1639):

> 1639 Q. "Mr. Schantz, were you present with Mr. Dan Stephens at the office of Mr. Bliss, Secretary of the Department of Trade and Commerce, in the month of September of last year (September, 1928) and at that time in your presence and to you did Mr. Bliss make this statement, or this in substance: 'If the special assessments are continued it will result in practically two-thirds of the state banks of this state, the going concerns, being wiped out?'"
> A. "Yes."

This conversation was corroborated by the testimony of Mr. Dan Stephens (Rec. p. 307, Q. 1661).

Mr. Bliss did not deny making such a statement, but said (Rec. p. 210, Qs. 1050-1051):

> A. "I neither affirm or deny it. I don't recall it."
>
> 1051 Q. "If you did make it was that your opinion at that time?"
> A. "Yes."

Mr. Bliss admitted that in the conversation referred to he talked about the difficulties surrounding these banks.

Mr. Stephens, president of the Fremont State Bank, testified (Rec. pp. 522-523, Q. 3289):

> 3289 Q. "Now, Mr. Stephens, from your knowledge of the banking situation and from your experience in connection with the Guaranty Fund matters, and your knowledge of conditions in Nebraska, in your opinion what will be the effect of the continuation of the special assessments upon the banks in Nebraska?"
>
> A. "I am of the opinion that the assessments will ultimately, if continued any considerable length of time, force a majority of the banks into liquidation."

Mr. Schantz, president of the State Bank of Omaha, testified (Rec. p. 592, Q. 3735):

> 3735 Q. "What in your opinion will be the effect of the continuance of the special assessment upon a large number, a majority of the banks as to impairment of the capital of the present going state banks in Nebraska?"
>
> A. "I think 400 banks will be operating with impaired capital."

Governor Weaver, in his inaugural address to the Legislature, while this suit was pending, in January, 1929, and who constitutes the official head of the state banking department and is a defendant in this case, and whose duty it is to advise the Legislature on those subjects and problems confronting the state, made the following solemn pronouncement (Rec., Exhibt 11, pp. 215-216):

> "When the facts relating to the public business present a grave problem requiring solution, such facts should be stated fully and frankly. I therefore respectfully call your attention to the fact that the Guarantee Fund, as nearly as I can ascertain, has present and prospective liabilities above present

assets of from sixteen to twenty million dollars; that the present income from assessments on banks is approximately one and one-half million dollars; that most of these liabilities either are, or soon will be, reduced to judgment, and the judgments will draw interest at seven per cent, which on a basis of twenty million dollars makes an annual interest charge of one million-four-hundred-thousand dollars; that with any appreciable reduction in this income either from further bank failures, nationalization of some of the present state banks, or seasonable declines in deposits, the income will meet the interest charge only, and no funds will be available to pay the principal; that under such a situation the Guarantee Fund cannot afford protection for present depositors against any future losses. * * *

"It logically follows, therefore, that we should draw a clear line of division between our program for liquidating past obligations and our program for the future. Justice to the splendid state banking institutions which have helped build Nebraska, and which must continue as indispensable factors in the state's growth and progress, demands that they must not be called upon for all the funds sufficient to simultaneously liquidate past obligations and build a fund for present and future needs. This position is sustained by the fact that the state banks of Nebraska have already paid, in their efforts for the protection of their depositors, an amount almost equal to the capital of all state banks, and that a continuation of such a load threatens the whole *system*.

General Conclusions of Fact.

The state is now asking to further draw upon the assets of the going banks and use the money to pay depositors in failed banks; to take from the protection of one class of depositors, the depositors in going banks,

in order to pay the other class of depositors those depositors in banks that have failed and who all these years have had the benefit of assessments against the going banks. This process takes from one class and pays to another; it benefits one and injures the other.

There is no dispute as to the theoretical basis of the law nor as to what was its original purpose. The theory was that the state banks by paying an assessment would contribute to a fund which should be kept at the amount of 1½ per cent of the total average deposits of all banks in the state and which would stand always immediately replenished when drawn upon and serve as a mutual protection for each and all of the going banks and their depositors in the state. Should a bank fail depositors would be paid, the assets of the banks used to restore and replenish the Guaranty Fund and the losses minimized or entirely recouped, the balance of the fund brought up by continuing assessments, would still afford protection to current depositors. A bank might fail by being unable to immediately pay its depositors, but if given a period of time in which to liquidate and realize upon its assets, would be eventually able to satisfy those claims. The Guaranty Fund thus created and thus operating would instill in the minds of the people confidence in the strength of the state banking system and this confidence would lead to stability in banking. Current depositors would know that they were protected by the assessment, limited as to each individual bank but secured by these aggregate total assessments which would produce a large fund for that purpose. The banks for 17 years under the operation of the law made the contributions required of them by the statute and until within the last year prior to the commencement of the suit the condition of the Bank Guaranty Fund, as disclosed

by the state banking department, which is the only source from which such information could have been obtained, has been thought to be solvent and to have been a satisfactorily operating law.

That condition has gone. Not only is there no security to the depositors in banks today from the Guaranty Fund, but the payments made to the Guaranty Fund by the present banks detract from such security and without any hope of these payments becoming a benefit to the present depositors in the face of an admitted deficit in the Guaranty Fund of over $16,000,000.00, which day by day is increasing in amount and with assessments against the banks, even in the huge amounts now exacted, insufficient to more than pay the interest at 7 per cent upon the already accumulated claims.

SUMMARY OF THE EVIDENCE UPON WHICH IT IS CLAIMED BY THE DEFENDANTS THAT THE BANKS HAVE WAIVED OR ARE ESTOPPED TO RAISE CONSTITUTIONAL QUESTIONS.

Publicity Given by the Banks to the Fact That Their Deposits Were Protected by the Guaranty Fund.

The record shows that many of the banks displayed signs that their deposits were protected by the Guaranty Fund of the State of Nebraska, and many of them carried that recital, or a small stamp containing the recital, on their drafts and checks.

But this was in response to the directory provisions of the statute. The Bank Guaranty Law, by Section 7995, Statutes of Nebraska for 1922, provides:

> The department of trade and commerce "shall issue to said banking corporation a certificate stating

> that said banking corporation has complied with the laws of this state for the protection of bank depositors, and that its depositors are protected by the depositors' guarantee fund of the State of Nebraska. Every banking corporation receiving such certificate shall conspicuously display the same in its place of business and said banking corporation may print or engrave upon its stationery words to the effect that its depositors are protected by the depositors' guarantee fund of the State of Nebraska."

This provision of the statute made it one of the requirements of the law that the state bank give notice that its depositors were protected by the "guarantee fund of the State of Nebraska." The banks were required to conspicuously display the certificate which contained such statement, and the directory provision of the statute also suggested that they print or engrave upon their stationery words to the effect that "its depositors are protected by the depositors' guarantee fund of the State of Nebraska."

What the banks did in this respect was simply in pursuance of and carrying out the provisions of the law.

Newspaper Advertisements with Respect to the Guaranty Law, Made During 1926.

The advertisements in the Omaha Bee were published in June, July, August and September of 1926.

The full page advertisements in the Omaha Bee were initiated by that newspaper itself, through Mr. Wilson, the editor. His purpose, of course, was to procure advertising for his newspaper. He first went to the Department of Trade and Commerce and to the Guaranty Fund Commission of the State of Nebraska and suggested to them his idea of advertising the Guaranty Fund. Those departments furnished him the facts and

the material to go into the advertisements, and after these were prepared and approved by the state departments they were then submitted to the banks, with the approval of these state departments, for publication. It is true that 300 of the banks paid for these publications, but it was an advertisement put up to them and sponsored by the state departments, properly reflecting the facts as they were known at that time. The purpose of these advertisements at that time was to prevent a run on the Nebraska banks, as had been occurring just across the border in the Dakotas.

Mr. Wilson testified as follows (Rec. pp. 220-221, Qs. 1096-1104 and Q. 1109):

1096 Q. "Who prepared the copy, Mr. Wilson?"
A. "Mr. Ballard Dunn and myself."

1097 Q. "Who was Ballard Dunn?"
A. "He was then editor-in-chief of the Omaha Bee."

1098 Q. "To whom was it submitted before publication?"
A. "It was submitted to Mr. Van E. Peterson, secretary of the Guaranty Fund Commission and members of the commission at that time."

1099 Q. "Was it submitted also to Mr. Griggs?"
A. "Also Kirk Griggs, secretary of the Department of Trade and Commerce."

1100 Q. "Before it was published?"
A. "Yes, sir. But members of the Guaranty Fund Commission didn't always see all advertisements, but they were always submitted to Mr. Peterson."

1101 Q. "Before publication?"
A. "Yes, sir."

1102 Q. "Was that submitted to them before the banks were solicited to pay for it?"

A. "The idea was submitted to them."

1103 Q. "The idea was submitted to the Department of Trade and Commerce before?"
A. "Yes, sir."

1104 Q. "And the banks were told it received their approval?"
A. "Yes, sir."

1109 Q. "Who furnished you the information from which you prepared the advertisements?"
A. "The members of the Guaranty Fund Commission and Kirk Griggs."

In addition to the testimony hereinbefore quoted, Mr. Schantz, Mr. Stephens and Kirk Griggs all testified that the advertisements published in the Bee were sponsored by and the facts set out therein furnished by the Department of Trade and Commerce, through their two officers, Mr. Griggs and Mr. Peterson.

Some of these advertisements being published in the Omaha Bee were also by a single banker, Mr. Stephens, of Fremont, published in a local newspaper there. His advertising could not be material to the issues here, for, so far as this case is concerned, it was a private and individual action on the part of one banker, for which the bankers of the state could in no way be accountable.

At the time of these publications, the state departments having exclusive right to all of the information with regard to the Guaranty Fund, were not aware and did not know the true situation, and the banks, which did not have the information even that these state departments had, were much more in the dark and believed at that time that the Guaranty Fund was operative and solvent.

The trial court made such a finding. Referring to the banks the court said (Rec. p. 52):

> "They contend that when they were stressing the advantages of that law they did not know the actual conditions of the state banks. That undoubtedly was true."

Information Given Out by the State Departments in the Year After That in Which the Newspaper Advertising was Done.

If the banks are to be estopped, or if it is claimed that they have waived any rights, it must be upon the basis that the banks had knowledge of conditions. There can be no estoppel or waiver unless it is done with knowledge, and there can be no estoppel unless the other party had no knowledge The Department of Trade and Commerce, being the agency of the public and thereby being the agency of the depositors as well, refused at all times to permit the banks or their representatives to see or have access to the records that would show the actual conditions of the banks and of the Guaranty Fund. All the bankers were able to do was to read such compilations as were from time to time furnished by the Department.

Prior to 1927 no information was given publicity by the state departments reflecting in any way against the Bank Guaranty Law or the Depositors' Guaranty Fund.

The Department of Trade and Commerce and the Guaranty Fund Commission, up to within a short time prior to the bringing of the suit, constantly informed the bankers and the public that the Guaranty Fund, with current assessments together with the assets of failed banks, was entirely solvent.

Such a declaration was made by the Guaranty Fund Commission, as shown by Exhibit 5 (Rec. pp. 127-129, incl.), in January, 1927. The pamphlet was at that time "sent out to the public and given to people who inquired for it" (Rec. p. 111, Q. 262), and indicated that the total deficit was only $2,715,000.00, which was fully covered by stockholders' liability of $3,588,000.00, as well as being protected by the yearly current assessment of practically $1,500,000.00 against the banks. It lauded the condition of the banking system and of the Guaranty Fund system. It declared that (Rec. pp. 129-130):

> "While this report covers the work up to July 1, 1926, the condition as of January 1, 1927, is but very little different. During the last six months of 1926 we took over eighteen banks but the loss in these banks is not as much as the loss paid during the same period. On January 1st we were operating forty-four banks as against thirty-six on June 30th, but the deposits of these forty-four were one hundred thousand dollars less. The average loss per bank closed is continually growing less and we do not feel that there will be a very large number of banks yet to be closed in which there will be a loss to the Guaranty Fund."

The report concluded with the remark: "Truly, Nebraska is a remarkable state and tells a story no other state can tell."

In May, 1927, Mr. Bliss estimated an approximate loss of $1,118,000.00 (Rec. p. 206, Q. 1021) from 64 banks that would in the future, in his estimation, be taken over. The trial court in the memorandum opinion refers to Mr. Bliss' prophesy as follows (Rec. p. 52):

> "As late as May 17, 1927, * * * the secretary of the Department of Trade and Commerce reported that

a study of the going banks showed that the future net loss would approximate $1,118,000."

As a matter of fact, there were 100 banks soon taken over instead of the 64 predicted by Mr. Bliss, and instead of there being a seven million dollar deficit in the Bank Guaranty Fund, as predicted in May, 1927, it develops that the deficit was over $16,000,000.00, and that the amount was rapidly increasing. Mr. Bliss did at that time also state that there were in all some 300 or 350 banks whose capital was impaired, but as to many of these, he declared that this was only slight and easy to remedy (Rec. p. 161, Q. 598).

On August 11, 1927, the secretary of the Guaranty Fund Commission in a report made this statement (Rec. pp. 125-126):

"In closing my report to you (the report made January 22, 1927), covering the work up to June 30, 1926, I said: 'Truly, Nebraska is a remarkable state and tells a story no other state can tell.' At the close of this fiscal year, we can both truthfully and proudly re-affirm that statement. The past year with its payment of more than $7,500,000.00 in cash to claimants adds another chapter to the story. Nebraska is proud of her record made by the Depositors' Guaranty Law, and with the favorable crop conditions which nature has bestowed upon us, the future appears much brighter. We know the larger portion of our troubles is past. Whatever degree of success has been obtained by the Commission is due to the loyalty and cooperation of the state bankers, the members of the Commission, and all those who are employed in the work, and to all I want to express my appreciation of their services and loyalty."

Claims of the Depositors Against the Guaranty Fund Were Paid up to November 30, 1927.

Mr. Van E. Peterson, secretary of the Guaranty Fund Commission, testified as follows (Rec. pp. 563-564, Qs. 3637-3639):

3637 Q. "What is the date farthest removed of liabilities, unpaid liabilities to depositors in the Guaranty Fund Commission?"

A. "November 30, 1927."

3638 Q. "You say all paid up to date, until that time?"

A. "Yes, we are now."

3639 Q. "You referred to what sort of claims when you gave the date of November 30, 1927?"

A. "Claims adjudicated by the Court and ordered paid from the Depositors' Guaranty Fund."

The First Public Intimation that the Guaranty Fund Might Fail was Given in June, 1928.

Mr. Bliss, secretary of the Department of Trade and Commerce, testified as follows (Rec. p. 471, Qs. 2871-2873):

2871 Q. "And in September, 1928, was that the first time you knew of the condition of the Fund being published?"

A. "No, I think there was something published as far back as June."

2872 Q. "1928?"

A. "Yes."

2873 Q. "That is as far back as you know of the condition being made public?"

A. "As far as I recall."

The Defendants Will Urge that the Banks, Having Received Benefits Under the Law, Should not be Heard to Complain. Operation Under the Law, However, was Compulsory, and Whether the Law Has Been Beneficial or Injurious is a Mooted Question.

Probably no better epitome of the fallacy of the Guaranty Fund Law can be found than what was set forth in the report of the Comptroller of the United States Currency as far back as 1921, in which he quotes from a well-known financial writer as follows:

> "The theory (guaranty of bank deposits) is that of insurance, but it has certain fundamental weaknesses which are more serious in their effect upon banking than in their relation to most other kinds of business to which insurance is applied. Insurance is sound as a protection against unavoidable hazards, but dangerous whenever it tends to increase the hazards. The insurance or guaranty of bank deposits tends to increase the hazards by eliminating the value of character as a banker's asset. It tends to make all banks look alike to the public, and puts the careful, conservative banker, who is unwilling to make large promises and take large chances, at a disadvantage. The theory is at fault in placing more emphasis upon the payment of depositors after a bank has failed than upon preventing failure. Its weakness always develops in a crisis."

In every state where the law has been enacted, it has hopelessly failed. The Guaranty Fund Commission of the State of North Dakota has recommended the repeal of that law. It is pointed out there that in order to pay the depositors' claims in that state of $14,498,663.75, *without interest*, it would take 122 years.

In every state the law has proved a failure. New York passed the first law in 1829; it failed. Vermont followed;

it failed. Texas, in 1909, enacted such a law; it failed in 1927, leaving $16,000,000.00 in claims unpaid. Kansas, in 1909, enacted a law, leaving it optional to the banks to come in or to withdraw. All banks have now withdrawn and the law is inoperative. In the state of Washington, 1917, a law was enacted and in 1921 amended to permit the banks to withdraw, and by reason of withdrawal of banks the law became inoperative the following year. In Mississippi a law was enacted in 1914, and the fund there has become hopelessly insolvent. In South Dakota the guaranty fund law was enacted in 1915, and has incurred net losses of $20,000,000.00 in 11 years. The Oklahoma law of 1910 failed.

Counsel for the state made much of the expressed opinion of Mr. Woods that the Bank Guaranty Law would account for $100,000,000.00 deposits in the state banks, which deposits would have gone to national banks or to other investments except for the Bank Guaranty Law. This necessarily, on the part of Mr. Woods, was a pure speculative guess, and this he admitted (Rec. p. 253, Q. 1293). This opinion of Mr. Woods, we take it, was based upon a false assumption.

The record shows that in 1911, 669 state banks had $73,000,000.00 in deposits (Rec. Exhibit 10, p. 422). In 1928, 726 state banks had $252,000,000.00 deposits. In 1911, 219 national banks had $83,000,000.00 deposits (Rec. p. 397, Qs. 2356-9), and in 1928, 159 national banks had $215,000,000.00 deposits (Rec. p. 593, Q. 3739). Without analysis it appears that the deposits in state banks increased over national banks to the extent of almost $50,000,000.00. This is because one may fail to consider that the number of state banks has, since 1911, largely

increased while the number of national banks since that time shows just the reverse, a substantial decrease.

When considered, let us see what these figures show. In 1911 the amount of deposits in state banks, divided among banks, shows deposits for each bank of $109,000.00. When divided among the existing state banks in 1928 there was in each bank an average of $346,000.00. In other words, the deposits had increased *three-fold* in state banks. But in 1911 the deposits in the national banks was on the average of $379,000.00 for each bank and the deposits in national banks in 1928, as to each bank was on the average of $1,356,000.00. In other words, the deposits in national banks had increased practically *four times*. The fact that there are larger aggregate deposits in state banks is easily accounted for. First, there are nearly five times as many state bank as national banks; second, a very great many of the communities in the state have no national banks, but are served by state banks alone.

Both Mr. Bliss and Mr. Woods declared in their testimony that the Guaranty Fund had little influence in attracting deposits in all cities of the size of Fremont, Grand Island, Hastings and above. (See Mr. Woods' testimony, Rec. p. 282, Q. 1472; Mr. Bliss' testimony, Rec. p. 409, Q. 2448).

The largest state banks, then, the banks in the cities, those making the largest contributions to the Guaranty Fund, received the smallest, if any, benefits even during the operative period of the law. The assessment against the State Bank of Omaha has been around $40,000.00 per year; of the Fremont State Bank around $11,000.00 per year; and of the Continental State Bank of Lincoln around $8,000.00 per year.

In Omaha it was pointed out that the deposits in all state banks was $12,000,000.00, while in national banks it was $102,000,000.00.

Mr. Woods was unable to name, except for one or two instances, where the national banks in any town had deposits less than the state banks.

Although Mr. Woods, testifying for the defendants, made a guess that the Guaranty Fund had attracted to state banks $100,000,000.00, still the record shows that he was an executive officer of a state bank, The Lincoln State Bank, in 1923, and that to avoid the payment of the special assessments and to avoid the obligation of operating under the Guaranty Law, *his bank nationalized*. That bank is now the Lincoln State National Bank.

With reference to the fact that his bank had nationalized, he said that it was desired to pursue a conservative policy and this they could not do, if they were to attempt to pay the large assessment (Rec. p. 251, Q. 1282):

> "We decided we would rather nationalize where we would be free to carry out that policy than to continue as a state bank and operate less conservatively in order to pay that *big assessment*."

Most of the state banks in Nebraska could not qualify for a national charter.

ASSIGNMENTS OF ERROR.

I.

The decision of the Supreme Court of Nebraska is erroneous in holding that the provisions of the Bank Guaranty Law complained of were constitutional and not in violation of the Fourteenth Amendment of the

Constitution of the United States and did not constitute the taking of property of the plaintiffs without due process of law, when in fact the assessments were unreasonable, oppressive and confiscatory.

II.

The decision of the Supreme Court of Nebraska is erroneous in holding that the provisions of the Bank Guaranty Law complained of were constitutional and not in violation of the Fourteenth Amendment of the Constitution of the United States and did not constitute the taking of property of the plaintiffs without due process of law, when the assessments in fact constitute a taking of private property for private use without just compensation; and when the enforcement of assessments bears no real or rational relation to any public good.

III.

If the decision of the Supreme Court of Nebraska is found to be based in part upon the ground that the banks were estopped or had waived their rights, then such portion of that decision, upon the undisputed facts in the record, is palpably unfounded both in fact and law.

BRIEF AND ARGUMENT

GENERAL DISCUSSION OF VALIDITY OF THE LAW AS A POLICE REGULATION, CONSIDERED IN THE LIGHT OF THE EFFECT OF ITS OPERATION UNDER PRESENT CONDITIONS.

The law expressly states its own purpose. Section 8024, Comp. Stat. Neb. 1922, declares that the law is "for the purpose of providing a Guaranty Fund for the protection of depositors in banks." The assessments com-

plained of are not to be collected for that purpose now. No fund exists and none can be created from these assessments with a present deficit of from $15,000,000.00 to $20,000,000.00. The present assessments in no way tend to contribute to the protection of the depositors in going banks. If a present existing and contributing bank should fail, its current contributions would not go to the payment of its own depositors but to the payment of depositors in other banks, which have long since failed.

The depositors in failed banks, having had the full benefit of all assessments levied under the law while they were depositors, and up to the time of the commencement of this suit, now seek to reach into the future and take from the present banks moneys placed there by their own and future depositors, and when the withdrawal of such moneys takes from the security of the very depositors who have placed the money there.

The operation of the law can serve no public interest now; it does not strengthen the present banking system nor protect current depositors. On the contrary it takes the amount of the assessments, totaling a million and a half a year, away from going banks and when the banks are in such condition, with reference to their own obligations and with reference to their own earnings that the assessments are oppressive, exorbitant and confiscatory and do not permit them compensatory returns upon their investment.

Instead of the regular assessments of 1/20 of one per cent being sufficient to create the fund and, after the fund was created, these assessments cease except in case of the necessity of re-continuing them when the fund should be depleted, we find not only that these regular assessments have themselves become continuous but that

the special assessments of ½ of 1% have also become regular.

In the beginning of the law the special assessments, which were a reserve provision to take care of the fund in case of emergency, and which were intended to be intermittant and special, and rarely, if ever, resorted to, have now become a part of a regular burden, if the operation under the law is to be continued. They are imposed when the fund is depleted, and the fund is not only gone but its depletion will never be cured, and the regular and special assessments must both, from now on, if the law continues to operate, be continued indefinitely and forever; a burden never contemplated when the law was enacted.

The payment of these assessments, used to pay the depositors in failed banks, prevents the going banks from meeting their own losses and their own obligations. The assessments confessedly are a complete loss to these banks and weaken them and destroy the security for present depositors. There are no reciprocal benefits received by these banks in return for these assessments. The welfare of the banks in which the public is interested is not served. It is damaged.

The conditions which supported the law in its beginning as a proper exercise of the police power, based upon the debatable ground as to how it would operate, have disappeared; speculation and prophesy have been supplanted by fact. The conditions have so changed and reversed themselves during the lapse of twenty years, while the law has been in operation, that the law can no longer now be justified. It now bears no real or substantial relation to the effectuation of its original object and purpose. Actually it defeats that object.

As we view it, the matter is not now open to argument but that the present assessments are unreasonable, exorbitant, oppressive, confiscatory and above all that the law authorizing the collection of these assessments bears no real or substantial relation to effectuating the original object of the law or any public good.

IN NOBLE STATE BANK V. HASKELL THE QUESTION OF WHETHER THE TAX WOULD BE OPPRESSIVE OR CONFISCATORY WAS EXPRESSLY ELIMINATED BY THE STATE COURT.

The Oklahoma Supreme Court, in *Noble State Bank* v. *Haskell*, 97 Pac. 590, 22 Okla. 48, pointed out that there was nothing in the record upon which the question of whether the tax was unreasonable in amount or confiscatory could be raised. At that time the amount of the assessment for the future had to be *estimated*, and there was nothing to show that the banks could not pay the estimated future assessment and also earn reasonable dividends.

The court said:

> "Counsel for plaintiff in error neither makes any contention or any attempt to show that the annual profits of this bank will not exceed any reasonable estimated assessment to be made by the banking board for said depositors' guaranty fund, nor that such assessment or assessments will prevent the bank from earning a reasonable annual dividend, * * *
>
> "Where can this be any confiscation of any rights acquired under any bank charter; there being no contention made that the reasonable estimated assessments will be so large as to prevent the bank annually from earning a sufficient amount to pay this assessment, and also a reasonable dividend?"

SCOPE OF THE OPINION OF THE SUPREME COURT OF THE UNITED STATES IN NOBLE STATE BANK V. HASKELL.

(a) The Law Was Justified as a Reasonable Exercise of the Police Power Upon the Conditions then Presented.

The above case was a suit originally brought in Oklahoma to enjoin the enforcement of the bank guaranty law of that state before it had been put in operation.

A similar suit was brought at the same time in Nebraska, by the state banks, to enjoin the putting into effect of the Bank Guaranty Law of the state of Nebraska. *Shallenberger* v. *First State Bank of Holstein*, 219 U. S. 114, 55 L. ed. 117. The Nebraska case was controlled by *Noble State Bank* v. *Haskell*, 219 U. S. 104, 55 L. ed 112. It is the Nebraska case that appellees contend is res adjudicata here.

These cases were determined by the Supreme Court of the United States prior to operation under the law. Nothing was before the court except what the assumed operation of the law would be. It was at that time estimated, as the opinion discloses, that when the Guaranty Fund was once created, it would stand permanently and without substantial additional assessments to maintain it. What the amount of future assessments would be could not be foretold. The question of whether they would become in the future oppressive and confiscatory was not, and could not be, at that time before the court for decison.

The Guaranty Law was sustained as a proper exercise of the police power of the state. Every presumption at that time was in favor of the constitutionality of the

law. There were no facts yet developed to refute such presumptions.

The facts upon which that decision was premised was the purpose of the law and its estimated operation.

The court, in *Noble State Bank* v. *Haskell*, pointed out that a depositors' guaranty fund would be created and, once created, it was proper to assume would need little to maintain it. The court said:

> "When a bank becomes insolvent and goes into the hands of the bank commissioner, if its *cash* immediately available is not enough to pay depositors in full, the banking board is to draw from the depositors' guaranty fund (and from additional assessments if required) the amount needed to make up the deficiency. A lien is reserved upon the assets of the failing bank to make good the sum thus taken from the fund. * * *
>
> "And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund, so as to be entitled to a return of what remained of it if the purpose were given up (see *Danby Bank* v. *State Treasurer*, 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business."

The case of *Danby Bank* v. *State Treasurer*, 39 Vt. 92, cited, was a holding by the Supreme Court of Vermont that the depositors' guaranty fund, so created, remained the property of the banks and that where the bank's charter terminated it would be entitled to withdraw its pro rata portion of that fund.

This condition of the existence and maintenance of a Guaranty Fund proposed to be provided by the law has now disappeared. There is no fund, but instead a lia-

bility against future assessments, if collectable, of from $15,000,000.00 to $20,000,000.00.

It was, at the time of the decision in *Noble State Bank* v. *Haskell*, contemplated that future assessments, after the fund was created, would be small. The court said:

> "It is established by a series of cases that an ulterior public advantage may justify a *comparatively insignificant* taking of private property for what, in its immediate purpose, is a private use."

The fact of small assessments after the creation of the fund has also disappeared. Instead of the *possibility*, as the court pointed out, that a portion of a bank's property "*might* be taken without return to pay debts of a failing rival," where the assets of such failing bank were insufficient to fully replenish the fund, we now, through alteration of conditions during 20 years experience, find that what was contemplated to be a special assessment, rarely to be levied and only upon that infrequent occasion when a failing bank's assets should be insufficient in the end to replenish the fund, has become regular and now amounts to a total of 8 per cent per annum upon the capital of the banks. The court in the opinion said that a comparatively insignificant taking for an immediate private use, when grounded on an ulterior public advantage, would be justified, but this would not permit such exactions on a large scale. The court said:

> "It will serve as a *datum* on this side, that, in our opinion, the statute before us is well within the state's constitutional power, while the use of the public credit on a large scale to help individuals in business has been held to be beyond the line."

Assuming the necessary existence of the fund, since it was provided for by the law, at the time of the de-

cision in *Noble State Bank* v. *Haskell*, its purpose and effect was also considered as measuring the justification of the law. The fund was intended to protect depositors in going banks. It was therefore of benefit to the banks. Each bank received a reciprocal benefit. The court said:

> "The share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."

The existence of the fund protected depositors in *going* banks. The fund is now gone. The exact reverse situation now prevails. Assessments do not create a fund nor are they for the protection of depositors in *going* banks but take away from the protection of such depositors.

The court pointed out the effect and purpose of the maintenance of the Guaranty Fund and the conditions which would result in public benefit, saying:

> "One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. * * * Even the primary object of the required assessment is not a private benefit, * * * but it is to make the currency of checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means for keeping money on hand. * * * The power to compel, beforehand, cooperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized * * *."

Under the conditions then assumed to exist, which conditions were presented to the court by the provisions of the law, and the presumptions then in its favor, the contribution to and maintenance of the fund was found to be within a reasonable exercise of the police power and

bore a direct relation to the public good. The banks received a reciprocal benefit from the operation of the law. The depositors received protection from the fund itself. It would make the currency of checks secure and bank failures unlikely.

These conditions have changed. The present banks receive no reciprocal benefits through assessments. Their assessments are utterly lost. The depositors in going banks receive no protection through these assessments. Their protection is destroyed. These contributions do not tend to make bank failures unlikely, but, by weakening the banks cause a tendency to failure. An obligation to pay the large liability of from $15,000,000.00 to $20,000,000.00 would discourage the making of deposits in state banks. The operation of the law now indisputably defeats its own object. While the public welfare was served through the protection of depositors, when that protection ceased, public benefits disappeared. The law cannot now be said to operate for a public purpose nor in its operation serve any ulterior nor direct public advantage. That characteristic of the law, which then justified it, is now gone.

In that opinion the court said the regulation could be justified:

> "Unless we can see that the means have no reasonable relation to the end."

The condition now presents such a situation. The operation of the law has no reasonable relation to the end sought to be attained.

(b) The Opinion Does Not Warrant the Interpretation That the State Could Impose Whatever Conditions Upon Banking it Saw fit to Exact, Even Though Arbitrary or Unreasonable.

It will be the contention of the appellees that the opinion of the court in *Noble State Bank* v. *Haskell* warrants the interpretation that the state had absolute power over banking corporations, since they were creatures of the state, and could impose upon banks, as conditions to their continuing to do business, whatever exactions the legislature might prescribe, whether reasonable or unreasonable, arbitrary or capricious, and that the banking business could not be conducted unless those conditions were met.

The court held that banking was of such a nature that the state might be able to take the whole business of banking under its control, and said:

> "We are of opinion that it (the state) may go on from regulation to prohibition except upon *such conditions* as it *may* prescribe."

Such conditions, however, referred to by the court, must have been, in light of the opinion, such *reasonable* conditions as would have been justified under the police power, and *not arbitrary, unreasonable or oppressive* conditions, nor *unconstitutional deprivations.*

The conditions referred to are immediately mentioned by the court, for, in explanation of this statement, the court continues as follows:

> "In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above-described cooperation are necessary safeguards, this court certainly cannot say that it is wrong."

The whole purport of this decision is that the law in its theory of operation bore a rational relation to a public purpose properly within the scope of the police power.

Considered in its context, the statement of the court could have meant nothing other than that the state could impose such reasonable conditions as were justified under the police power; that it could impose such conditions as the state "*may*" or, in other words, "*has authority*" to prescribe.

The court did not hold that the state would have the power to prohibit the banking business arbitrarily and absolutely without taking over unto itself that business.

We give significance to the statement of the court that the charter rights of the banks would not be impaired:

> "*unless that statute deprives the plaintiff of life, liberty or property without due process of law.*"

In other words, the conditions sought to be imposed upon the banks must not violate constitutional protection.

Again, speaking of the conditions imposed upon the banks as being justified and within the exercise of the police power, in the opinion on rehearing the court further said:

> "We have given what we deemed sufficient reasons for holding that such a condition may be imposed."

The whole purport of the Supreme Court's decision, as we view it, was based upon the question of whether or not the act was then a reasonable exercise of the police power, and the decision has been so interpreted by the

Supreme Court of the United States and other courts since.

IN SUBSEQUENT DECISIONS BY THE SUPREME COURT AND BY OTHER COURTS THE CASE OF NOBLE STATE BANK V. HASKELL IS CITED AS A RULING INVOLVING ALONE THE POLICE POWER OF THE STATE.

We have examined the subsequent cases where *Noble State Bank* v. *Haskell* and the companion Guaranty Fund decisions are cited. In every instance the Guaranty Fund decision is cited as a holding involving the question of the exercise of the police power.

The case of *Farmers and Merchants' Bank* v. *Federal Reserve Bank*, 262 U. S. 649, 67 L. ed. 1157, involves banking legislation of the state of North Carolina. The Supreme Court of the United States, referring to the Guaranty Fund decision, said:

> "So construed, the statute is merely an exercise of the police power, by which the banking business is regulated for the purpose of protecting the public, and promoting the general welfare. *Noble State Bank* v. *Haskell*, 219 U. S. 104, 575, 55 L. ed. 112, 341, 32 L. R. A. (N. S.) 1062, 1065, 31 Sup. Ct. Rep. 186, 299, Ann. Cas. 1912A 487."

In the case immediately following the Guaranty Fund cases, *Engel* v. *O'Malley*, 219 U. S. 128, 55 L. ed. 128, the court held that the state had, as a reasonable exercise of the police power, the right to require licenses from individuals who should engage in the banking business. In that case Mr. Justice Holmes, in referring to the decision in *Noble State Bank* v. *Haskell*, says:

> "The case cited (*Noble State Bank* v. *Haskell*) establishes that the state *may regulate that business*, and may take strong measures to render it secure.

> It also establishes that the plaintiff has no such constitutional right to carry it on at will as to *raise him above state laws not manifestly unfit to accomplish the supposed end, greatly in excess of the need, or arbitrary and capricious in discrimination.*"

The limitation upon the state's power in the exercise of a police regulation is reiterated by Mr. Justice Holmes in the case of *Pennsylvania Coal Company* v. *Mahon*, 260 U. S. 393, 67 L. ed. 322. In that case the court declared:

> "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."

And referring incidentally to a statutory provision requiring coal mining companies to observe certain cooperative measures for the reciprocal protection of each other, the court, following the reasoning in *Noble State Bank* v. *Haskell*, through Mr. Justice Holmes, said:

> "That was a requirement for the safety of employees invited into the mine, and *secured an average reciprocity of advantage that has been recognized* as a justification of various laws. * * *
>
> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders."

State courts have also so interpreted the decision. In *Eureka County Bank Habeas Corpus Cases*, 126 Pac. 655, 35 Nev. 80, the court in the opinion said:

> "In *Noble State Bank* v. *Haskell*, 219 U. S. 111, 31 Sup. Ct. 186, 55 L. ed. 112, 32 L. R. A. (N. S.)

1062, Ann. Cas. 1912A 487, it was held that the levying and collection from banks existing under state laws of an assessment based upon daily average deposits, for the purpose of creating a depositors' guaranty fund for the purpose of securing the full payment of deposits in case any such bank becomes insolvent, is a valid exercise of the police power. In that case the Supreme Court of the United States, considering provisions of the federal Constitution which, it was claimed, restricted the power of the state or the legislature, Mr. Justice Holmes writing the decision, said: 'We are of the opinion that it may go on from regulation to prohibition, except upon such conditions as it may prescribe.'

"Whether the legislature may entirely prohibit the banking business was not a question before the court in that case, and to this extent the language may be considered obiter. The court said that objections under the state Constitution were not open there. Whether that eminent tribunal, or any court, would hold that the Legislature may entirely prohibit the banking business, because it is of such public concern that it is subject to regulation it is not necessary to consider, any more than it would be to determine whether the Legislature may prohibit the sale of groceries and drugs, because laws are properly enacted requiring the purity of these articles, or to prohibit the transportation and manufacturing businesses, because laws are properly enacted regulating and safeguarding these under the police power."

And in some cases it has been held, in the absence of a consideration of the event that the government take over the business of banking, that the business of banking cannot be prohibited, although it is subject to regulation under the police power.

Weed v. *Bergh*, 141 Wis. 569, 124 N. W. 664, 25 L. R. A. (N. S.) 1217.

Re Pittman, 31 Nev. 43, 99 Pac. 700.

RESERVE POWER OVER CORPORATIONS IS NOT UNLIMITED AND THE REGULATION, AS AN EXERCISE OF THAT POWER, WOULD BE VALID ONLY SO LONG AS THE REGULATION WAS REASONABLE AND DOES NOT IMPAIR THE OBJECT OF THE GRANT.

The question of the right to repeal the charters of the banks is not involved in the case, for there has been no legislative attempt to do that.

A banking charter is a special privilege granted to such of those corporations applying as are selected by the banking board. Banking rights are denied to individuals. The banks are by statute declared to be quasi-public institutions. Their charters, when acted upon by them, we contend constitute franchises granted by the state in consideration of the performance of a public service, and constitute property rights within the protection of the Fourteenth Amendment.

Frost v. *Corporation Commission*, 278 U. S. 515, 519, 534, 73 L. ed. 483, 487, 494.

Bank of Augusta v. *Earle*, 38 U. S. (13 Pet.) 519, 595, 10 L. ed. 274.

But the Bank Guaranty Law is a regulation of existing banks, not a repeal of charters. Four hundred and ten of the banking corporations whose names appear on the petition were chartered prior to the enactment of the Bank Guaranty Law. The legislature has not prohibited them from continuing in business, but as a regulation of a business to be continued has added to their obligations that of the Bank Guaranty Law. It is a regulation governing going banks and, therefore, must not violate constitutional inhibitions.

These banks by statute have complex duties to perform. They have contractual rights with all of their depositors,

recognized and imposed by law, which they must carry out. The banks, as well as stockholders and directors, owe obligations, imposed by statute, to the creditors of the bank.

The Bank Guaranty Law, as applied to going banks, in its operation under present conditions, defeats the object of the banking charter, interferes with and impairs the ability of the bank to perform its obligations to its depositors and to its creditors, affects and increases the liability of its stockholders, takes from it by assessment property for a private purpose and without compensation.

The general reservation of powers over corporations, set forth in the Nebraska constitution (Constitution of 1875, which was in effect in 1909 when the Bank Guaranty Law was enacted, Article XIV, Section 1), is not as comprehensive in its scope as the provisions in Oklahoma, involved in the case of *Noble State Bank* v. *Haskell* (Oklahoma Constitution, Sec. 47, Art. 9; Wilson's Rev. & Ann. St. 1903, Sec. 3, Chap. 18).

But, however that may be, we understand the rule is that even a general reservation of the right to alter or amend gives the legislature the power to make any alteration or amendment in the charter which will not defeat or substantially impair the object of the grant or change its fundamental character.

Regulations imposed upon going corporations must be reasonable, justified under the police power, and not violate constitutional protection.

The reserve power of the state over corporations is not unlimited. The legislature can pass such laws affecting the corporation which bear in their operation a

real and substantial relation to the public welfare, and which do not defeat or substantially impair the object of the corporate grant. The extent of such reserve power to affect corporate rights in the interest of the public welfare is practically co-extensive with the limits of the exercise of the police power.

In the case of *Looker* v. *Maynard*, 179 U. S. 46, 45 L. ed. 79, the Supreme Court of the United States, referring to the reserve power of the state over corporations, declared that the power was not unlimited but could be exercised so long only as it did not defeat or substantially impair the object of the grant, and when the regulation was reasonable and done to protect the rights of the public and to promote the due administration of corporate affairs. In the opinion the court said:

> "Many a state of the Union, in order to secure to its legislature the exercise of a fuller parliamentary or legislative power over corporations than would otherwise exist, inserted, either in its statutes or in its Constitution, a provision that charters thenceforth granted should be subject to alteration, amendment or repeal at the pleasure of the legislature. * * * The effect of such a provision, whether contained in an original act of incorporation, or in a constitution or general law subject to which a charter is accepted, is, at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the rights of the public or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs."

In *New York & N. E. R. Co.* v. *Town of Bristol*, 151 U. S. 556, 38 L. ed. 269, the court in the syllabus said:

> "A power reserved to the legislature to alter, amend or repeal a charter, authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right."

In the case of *Stanislaus County* v. *San Joaquin & K's, R. C. & I. Co.*, 192 U. S. 201, 213, 48 L. ed. 406, 413, the court, in speaking of the power of the legislature to amend charters under the reserve power of the state, said:

> "These cases also hold that there is a limitation, even to the power of amendment, when reserved in the constitution or a statute of a state. Some of the cases, although holding that the power to amend or repeal was properly exercised in them, also state that the power is not without limit; that the alterations must be reasonably made, in good faith, and consistent with the scope and object of the act of incorporation, and that sheer oppression and wrong could not be inflicted under the guise of amendment or alteration; that beyond the sphere of the reserved powers the vested rights of property in corporations in such cases are surrounded by the same sanction and are as inviolable as in other cases."

We think the reasoning and holding in *Chicago, M. & St. P. R. Co.* v. *Wisconsin*, 238 U. S. 491, 59 L. ed. 1423, is particularly applicable. In that case the court held that a statute prohibiting the letting down of an unengaged upper berth in a Pullman car, when the lower berth was occupied, was unreasonable as a police regulation or as an exercise of the reserve power of the state over corporations.

It was contended that the statute was arbitrary and unreasonable, not designed to accomplish a legitimate public purpose, and contrary to natural justice. The court so held and found the regulation operated to take property from the railroad company in violation of the due process clause of the Fourteenth Amendment. The railroad was a going concern, it had complex public duties to perform, and, in view of its duties, it was held the regulation unduly and unreasonably interfered with the object of the public grant and could not be sustained. Speaking of the railroad company's duties to the public, the court said:

> "In this respect the statute would lessen the ability of the company to furnish the place of sleep and rest which it offers to the public. A sleeping car may not be an 'inn on wheels,' but the operating company does engage to furnish its patrons with a place in which they can rest without intrusion upon their privacy. Holding out these inducements and seeking this patronage, the company is entitled to the privilege of managing its business in its own way so long as it does not injuriously affect the health, comfort, safety and convenience of the public. The right of the state to regulate public carriers in the interest of the public is very great. But that great power does not warrant an unreasonable interference with the right of management, or the taking of the carrier's property without compensation."

As to the extent of the reserve power of the state over corporations, the court said:

> "In the brief of counsel for the state it is argued that the statute can be sustained as a valid exercise of the state's reserved power to alter the charter of the company. That question does not seem to have been raised in the state court, nor was its decision based on that proposition. Indeed, such a ruling would seem to have been opposed to *State ex rel.*

Northern P. R. Co. v. *Railroad Commission,* 140 Wis. 157, 121 N. W. 919, and the *Water Power Cases,* 148 Wis. 124, 38 L. R. A. (N. S.) 526, 134 N. W. 330, where it was held that the right to amend a charter does not authorize the taking of the company's property without just compensation. The same view has been repeatedly expressed in the decisions of this court. For example, in *Shields* v. *Ohio,* 95 U. S. 324, 24 L. ed. 359, it was said that 'the power of alteration and amendment is not without limit. The alterations must be reasonable * * * and be consistent with the scope and object of the act of incorporation.' * * * Again, in *Stearns* v. *Minnesota,* 179 U. S. 223, 259, 45 L. ed. 162, 180, 21 Sup. Ct. Rep. 73, it was held that the reserved right to amend a corporate charter 'does not confer mere arbitrary power, and cannot be so exercised as to violate fundamental principles of justice by * * * taking of property without due process of law.' *Lake Shore & M. S. R. Co.* v. *Smith,* 173 U. S. 690, 43 L. ed. 861, 19 Sup. Ct. Rep. 565; *Stanislaus County* v. *San Joaquin & K. River Canal & Irrig. Co.,* 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241; *Sinking Fund Cases,* 99 U. S. 720, 25 L. ed. 501; *Miller* v. *New York,* 15 Wall. 498, 21 L. ed. 104; see also *Delaware, L. & W. R. Co.* v. *Public Utilities,* 85 N. J. L. 28, 38, 88 Atl. 849, where it was held that, under such a power, the company could not be required to furnish free transportation to certain designated officials."

On this subject the cases are collected in Fletcher Cyc. Corporations, Vol. 7, Sec. 4317 and 4308.

Applying by analogy the reasoning in last above cited case to ours: The banks are quasi-public institutions: they have certain specific duties to perform and certain services to render to the public. The Bank Guaranty Law unduly and unreasonably interferes with those duties and impairs and destroys the object of the corporate

grant. As to these going corporations the enactment of the Guaranty Law has now become, under present operation, a violation of the due process clause of the Fourteenth Amendment, whether the regulation is attempted to be justified under the police power or under the reserve power of the state over corporations.

IT IS NOT A SUFFICIENT ANSWER, WHICH APPELLEES WILL MAKE, TO SAY THAT THE CORPORATION MAY CEASE BUSINESS IN ORDER TO AVOID AN UNCONSTITUTIONAL BURDEN.

The banks are permitted to operate, and while so operating are entitled to constitutional protection.

The reasoning in the case of *Frost* v. *Railroad Commission*, 271 U. S. 583, 70 L. ed. 1101, is particularly pertinent to the issue here where the court held that a state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit so long as it does not require the relinquishment of constitutional rights. In that case, involving a statute of California, requiring private carriers on the highways to act as common carriers, the court, holding the statute unconstitutional, in the opinion said:

> "The naked question which we have to determine, therefore, is whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so. * * *
>
> "There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power to compel a private carrier to assume

against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. * * * In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood, or to submit to a requirement which may constitute an intolerable burden.

"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Similar holdings are found in *Hanover Fire Insurance Co.* v. *Carr*, 272 U. S. 494, 517, 71 L. ed. 372, 383, and in *Power Manufacturing Co.* v. *Saunders*, 274 U. S. 490, 497, 71 L. ed. 1165, 1169.

In *Hanover Fire Insurance Co. v. Carr, supra*, the court said:

> "One argument urged against our conclusion is that the relation of a foreign insurance company to the state which permits it to do business within its limits is contractual and that by coming into the state and engaging in business on the conditions imposed, it waives all constitutional restrictions and can not object to a condition or law regulating its obligations even though as a statute operating in invitum it may be in conflict with constitutional limitations. This argument can not prevail in view of the decisions of this court in well considered cases."

The case of *Western Union Telegraph Co. v. State of Kansas*, 216 U. S. 1, 54, L. ed. 355, was an action by the state of Kansas to oust the Western Union Telegraph Company from the state, so far as local business was concerned, on the ground that the company had refused to pay a privilege tax assessed against it by the state, based upon a percentage of 1/20 of 1% of the entire capital stock of the company, although only a small part of the property of the company was used in Kansas in the operation of its business. The tax consumed the local net profits of the company. The local business carried on in Kansas was barely sufficient to pay operating costs.

The defendant company contended that the tax, being a privilege tax, conditioned to the right of a foreign corporation to do business in Kansas, was exorbitant and confiscatory.

The syllabus of the case declares that the tax was invalid under the commerce clause, and also under the due process clause, of the Federal Constitution. The syllabus,

so far as it refers to the due process clause, is based upon the concurring opinion of Mr. Justice White, whose reasoning is particularly applicable to the case here.

In his opinion Mr. Justice White said that the Western Union had been permitted to come into the state to make its investments, and that the value of its property was dependent upon the operation of its business; that to deprive it of its business, confiscated the value of its property. A license tax exacted of a foreign corporation, he held, after it had been permitted to come into the state and become possessed of property rights within the state, must be reasonable and within constitutional limitations. He pointed out that the theory that such a company had the *election* of withdrawing from the state and ceasing business, or paying the tax conditional to its operation, did not give it the protection of constitutional safeguards. He said:

> "Let me illustrate. The telegraph company has expended in the state large sums of money, adequate for the purpose of enabling it to do both local and interstate business. The investment is there, and its magnitude it is fair to assume, is, in part, a resultant of the requirements of the local business. The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired; that is, for both interstate and local business. The state law takes the property, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden, upon the condition that such burden be discharged or the local business be abandoned. What possible election can there be? The property is in the state. It has been invested therein for the very purpose of doing local as well as other business. If the unconstitutional burden be not assumed, local business must cease, and hence the property established for

the purpose of doing the local business becomes worthless and is in effect confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place. * * *

"I concede that the corporation, in going in and investing its property within the state, did so subject to the right of the state to exert, as to the property thus in the state, all lawful powers which might be called into play as to property so situated, of the character of that under consideration. But I cannot assent to the correctness of the contention in so far as it asserts that the state may suffer a corporation to come into its borders, invest in property therein, and then, after having allowed, by acquiescence or implied invitation, such a situation to arise, the state may treat the corporation as if it had never come in and its property within the state as if it were wholly out of the state, and despoil the corporation of its rights and property upon such false assumption."

A STATUTE MAY BE VALID AS APPLIED TO ONE STATE OF FACTS AND YET LATER BE INVALID AS APPLIED TO ANOTHER STATE OF FACTS DEVELOPED DURING ITS OPERATION. THE OPERATION AND EFFECT OF THE LAW DETERMINE ITS VALIDITY.

The particular act of which the plaintiffs complain is the levy of the special assessment on December 15, 1928, by the Department of Trade and Commerce, and assessments thereafter to be levied. Plaintiffs claim that through that assessment this board, as agents of the state, were taking, or attempting to take, under color of the statute, the particular property of the banks represented by the assessment without due process of law and for a private purpose.

Whether this is true depends upon the operation of the law at that particular time, even though at a prior time,

or when the law was first enacted, and under other conditions, a special assessment would have been valid and constitutional.

In *Poindexter* v. *Greenhow*, 114 U. S. 270, 29 L. ed. 185, 194, the court, in a case involving certain tax laws of the state of Virginia, said:

> "And it is no objection to the remedy in such cases, that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous, where the tax laws of a state, which in their general and proper application are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way they operate to deprive the party complaining, of a right secured to him by the Constitution of the United States."

In *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289, 66 L. Ed. 239, 243, a case involving a statute prescribing conditions upon which corporations might do business in the state, the court said:

> "A statute may be invalid as applied to one state of facts, and yet valid as applied to another. *Poindexter* v. *Greenhow*, 114 U. S. 270, 295, 29 L. ed. 195, 194, 5 Sup. Ct. Rep. 903, 962; *St. Louis, I. M. & S. R. Co.* v. *Wynne*, 224 U. S. 354, 56 L. ed. 799, 42 L. R. A. (N. S.) 102, 32 Sup. Ct. Rep. 493; *Kansas City Southern R. Co.* v. *Anderson*, 233 U. S. 325, 58 L. ed. 983, 34 Sup. Ct. Rep. 599."

In *Galveston Electric Co.* v. *City of Galveston*, 258 U. S. 388, 400, 66 L. ed. 678, 685, the court said:

> "A rate ordinance invalid when adopted may later become valid, just as an ordinance valid when made

> may become invalid by change in conditions. *Municipal Gas Co.* v. *Public Service Commission*, 225 N. Y. 89, 96, P. U. R. 1919C 364, 121 N. E. 772. Compare *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19, 53 L. ed. 382, 48 L. R. A. (N. S.) 1134, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034; *Newton* v. *Consolidated Gas Co.*, decided March 6, 1922 (258 U. S. 165, ante, 538, 42 Sup. Ct. Rep. 264)."

The rule has been applied to statutes regulating railroad rates.

Smyth v. *Ames*, 169 U. S. 466, 42 L. ed. 819.

The Supreme Court of Ohio, citing decisions of the Supreme Court of the United States, in *Castle* v. *Mason*, 110 N. E. 463, 91 Oh. St. 296, declared, in a case involving the operative effect of an oil inspection law:

> "A law may be within the pale of constitutional authority when originally passed, yet because of its future operations it may directly contravene the organic law."

In Broom's Legal Maxims, p. 159, we read:

> "Cessante Ratione Legis Cessat Ipsa Lex. Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself."

The general rule stated has been followed in Nebraska.

Cram v. *Chicago, B. & Q. R. Co.*, 84 Neb. 607, 85 Neb. 586.

Davison v. *Chicago & N. W. R. Co.*, 100 Neb. 462.

In the first Nebraska case cited a law regulating the speed of freight trains carrying live stock was held constitutional, and in the second case, six years and a half later, on a different state of facts, was held unconstitutional.

The constitutionality of a law is not to be determined alone by the face of the statute but by its operative effect in the particular instance complained of.

In this connection in *State of Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 458, the court said:

> "It is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States."

The assessments complained of, levied by representatives of the state under color of the statute, constitute the unlawful taking, and the operative effect of this taking, under the conditions shown at that time, determines the question of constitutionality.

Home Telephone & Telegraph Co. v. *City of Los Angeles*, 227 U. S. 278, 57 L. ed. 510.

Raymond v. *Chicago Union T. Co.*, 207 U. S. 20, 52 L. ed. 78.

The decision of the Supreme Court of South Dakota, in *First State Bank* v. *Smith*, 207 N. W. 467, 49 S. D. 518, which will be particularly relied upon by the appellees in this case, is in violation of the principles announced in the foregoing decisions, and we submit is clearly wrong.

THE CASE OF NOBLE STATE BANK V. HASKELL IS NOT A BAR TO THIS ACTION NOR RES JUDICATA OF THE ISSUES HERE PRESENTED

The issues and questions therein decided are not the ones presented for decision here. If we are right in

the last proposition that the validity of a police regulation is to be determined by its operation under the conditions which exist at the time the protected right is violated, then the doctrine of res judicata cannot apply. The changed conditions are the gist of our case.

At the time of the decision in *Noble State Bank* v. *Haskell* present conditions could not be passed upon, for they were not in existence and no right was then being violated by the law under the conditions which are presented today.

The court will examine the record in the former case to determine the questions essential to its decision of the former controversy.

> *United Shoe Machinery Corporation* v. *United States*, 258 U. S. 451, 66 L. ed. 708.
>
> *Postal Telegraph-Cable Company* v. *Newport*, 247 U. S. 464, 62 L. ed 1215.

A judgment in one suit is not res judicata in a later suit where the issues and questions to be decided are not the same.

> *United States* v. *Southern Pacific Co.*, 259 U. S. 214, 66 L. ed. 907.
>
> *Roberts* v. *Northern Pacific R. Co.*, 158 U. S. 1, 39 L. ed. 873.
>
> *McComb* v. *Frink*, 149 U. S. 629, 37 L. ed. 876.
>
> *Baltimore Steamship Co.* v. *Phillips*, 274 U. S. 316, 71 L. ed. 1069.
>
> *Troxell* v. *Delaware, L. & W. R. Co.*, 227 U. S. 434, 57 L. ed. 586.
>
> *Russell* v. *Place*, 94 U. S. 606, 24 L. ed. 214.

The decision is not res judicata as to those matters and issues which could not have been raised in the former controversy at the time it was tried.

Ash Sheep Co. v. *United States*, 252 U. S. 159, 64 L. ed. 507.

The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties, where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants.

Oman v. *Bedford Bowling Green Stone Co.*, 134 Fed. 64 (Circuit Court of Appeals, Sixth Circuit).

County of Mobile v. *Kimball*, 102 U. S. 691, 26 L. ed. 238.

See cases listed in 34 Corpus Juris, on "Judgments," p. 905.

The issues for determination in this case are not the same as those presented for decision in *Noble State Bank* v. *Haskell*. These issues could not have been presented at that time. The operation of the law under present and changed conditions is the issue in the case, and if the law is to be tested by its operation under the conditions presented at the time of the commencement of this suit, then the decision in the former case is not a bar and is not res judicata of the questions here.

A POLICE REGULATION IS NOT VALID THAT DOES NOT HAVE A CLEAR, REAL AND SUBSTANTIAL TENDENCY TO EFFECT A LEGITIMATE PUBLIC PURPOSE, AND THE EFFECT OF THE STATUTE IN ITS OPERATION MUST, IN A PLAIN, APPRECIABLE AND APPROPRIATE MANNER, TEND TOWARDS THE ACCOMPLISHMENT OF THE OBJECT.

Fairmont Creamery Co. v. *State of Minnesota*, 274 U. S. 1, 71 L. ed. 893.

Burns Baking Co. v. *Bryan*, 264 U. S. 504, 68 L. ed 813.

Meyer v. *State of Nebraska*, 262 U. S. 390, 67 L. ed. 1042.

State of Washington ex rel Seattle Title Trust Co. v. *Roberge*, 278 U. S. 116, 73 L. ed. 210.

See

Weaver v. *Kochn*, 231 N. W. 703 (Neb.), holding a general tax could not be levied to pay depositors in failed banks.

DEPOSITORS IN FAILED BANKS HAVE NO CONTRACTUAL RIGHTS AGAINST THE GOING BANKS NOR AGAINST THE GUARANTY FUND FOR THE RECOVERY OF THEIR DEPOSITS.

Wirtz v. *Nestos*, 200 N. W. 524, 51 N. D. 603.

Standard Oil Co. v. *Engel*, 212 N. W. 822, 55 N. D. 163.

As said in the first case cited, the broad basis upon which the exercise of the police power rests is the safety and welfare of the state and of its citizens as a whole, rather than the interest of the individuals who make deposits in banks, and a depositor has no vested right in a rule of law established through an exercise of the police power.

PAST SUCCESS OF THE BANKS CANNOT SUPPORT A TAKING WHICH WOULD BE CONFISCATORY UNDER PRESENT CONDITIONS.

Newton v. Consolidated Gas Co., 258 U. S. 165, 66 L. ed. 538.

Board of Public Utility Commissioners v. New York Telephone Co., 271 U. S. 23, 70 L. ed. 808.

THE NET EARNINGS OF THE BANKS AFTER PAYMENT OF ASSESSMENTS HAVE NOT SHOWN A REASONABLE RETURN.

Ohio Utilities Co. v. Public Utilities Commission, 267 U. S. 359, 69 L. ed. 656.

Lincoln Gas & E. L. Co. v. City of Lincoln, 250 U. S. 256, 63 L. ed. 656.

McCardle v. Indianapolis Water Co., 272 U. S. 400, 420, 71 L. ed. 316, 329.

THE QUESTION OF WAIVER OR ESTOPPEL

THE FORMAL JUDGMENT OF THE COURT PLACES THE DECISION UPON ONE GROUND ALONE, THAT THE LAW IS CONSTITUTIONAL, AND THIS NOT ONLY INTERPRETS BUT CONTROLS WHAT MAY HAVE BEEN SAID IN THE STATE COURT'S OPINION.

The judgment entered by the state Supreme Court (Rec. p. 58), places the decision on one ground alone: That the law is constitutional and does not deprive the plaintiffs of property without due process of law. The judgment so entered reads as follows:

> "This cause coming on to be heard upon appeal from the district court of Lancaster county, was

argued by counsel and submitted to the court; upon due consideration whereof, the court finds error apparent in the record of the proceedings and judgment of said district court in that, contrary to the findings of that court, the levy of a special assessment upon the state banks pursuant to the provisions of Section 8028, Compiled Statutes, 1922, as amended by Section 26, Chapter 191, Laws of 1923, does not constitute the taking of private property without due process of law. It is, therefore, considered, ordered and adjudged that the temporary injunction granted herein by said district court be, and hereby is, dissolved, the judgment is reversed and the action is hereby dismissed; that appellants pay all costs incurred herein by them, taxed at $....., and have and recover of and from appellees their costs so expended; that appellees pay all costs incurred herein by them, taxed at $.....; for all of which execution is hereby awarded, and that a mandate issue accordingly."

The opinion discusses the question of whether the banks should be heard to complain. It is not clear whether some legal principle is referred to. Nowhere in the opinion is the term "waiver" or "estoppel" used. We do not interpret the opinion as placing the decision in part upon that ground. That was not the intention of the court. We discuss that elsewhere.

It is our contention that the judgment entered *is* the court's decision. It is the formal record of the decision. It states its own ground. The record imports verity. When the judgment is thus clear and final it is not only unnecessary but unavailing to resort to the court's opinion, which under the present rules is a part of the record only in a *qualified sense*, and is resorted to by the reviewing court only when necessary to *aid* in a determination of what has been decided. The judgment

here states its own grounds. We submit such a record concludes that question.

The opinions of the Supreme Court of Nebraska are not required by law to be recorded (Sections 1074-1075, Nebraska Statutes, 1922), and do not become a part of the record in the case, as is true in some states, notably that of Louisiana, in which states the Supreme Court of the United States, even before the amendment, in 1867, of the Federal statutes pertaining to review in the Supreme Court of the United States, considered the opinion as a part of the formal record in the case. See

Williams v. *Norris*, 12 Wheat. 117, 6 L. ed. 571.

Rector v. *Ashley*, 73 U. S. 142, 18 L. ed. 733.

Burt v. *Smith*, 203 U. S. 129, 135, 51 L. ed. 121, 126.

We understand the rule of the Supreme Court of the United States now to be that whether or not the state law makes the opinion of its courts a part of the record, the Supreme Court will examine the opinion and it is considered a part of the record in a *limited sense* only, that is, where necessary for *aiding* in a determination of what was made the basis of the lower court's decision. When the record itself affirmatively discloses this, it is unnecessary to resort to the opinion of the state court.

In one of the first decisions passing upon this question, *Murdock* v. *Memphis*, 87 U. S. 590, 22 L. ed. 429, the Supreme Court of the United States declared, under the new rules adopted after the amendment of the law in 1867, that the opinion of the lower court would be looked into to ascertain the basis of that court's decision so far as the opinion "may be useful in determining that question," and then the court said:

> "But after all, the record of the case, its pleadings, bills of exceptions, judgment, evidence, in short, its record, whether it be a case in law or equity, must be the chief foundation of the inquiry; and while we are not prepared to fix any absolute limit to the sources of the inquiry under the new Act, we feel quite sure it was not intended to open the scope of it to any loose range of investigation."

Following the same rule in *Fire Association of Philadelphia* v. *New York*, 119 U. S. 110, 30 L. ed. 342, the court said that the opinion of the lower court:

> "is transmitted to us with the record, in compliance with our Eighth Rule, for the purpose of aiding in determining what was decided by that court."

In *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 73 L. ed. 184, a petition for habeas corpus alleged that the statute involved was "unconstitutional." The specific grounds were not stated nor made clear by the pleading alone. The opinion of the state court, however, showed that a contention was raised and argued upon the demurrer that the law was unconstitutional as in violation of the Fourteenth Amendment. The opinion of the state court was examined for the purpose of aiding in determining what questions were raised and decided, the record, without a resort to the court's opinion, not being clear upon that point. The Supreme Court of the United States in that case, giving recognition to the limited use to which an examination of the opinion would be put, said that the opinion delivered by the lower court "*for present purposes* is deemed a part of the record."

In the case of *Loeb* v. *Trustees of Columbia Township*, 179 U. S. 472, 45 L. ed. 280, the record in the case contained a demurrer to the plaintiff's petition, but the demurrer did not specifically set forth that a constitutional

question was raised and argued. The opinion of the lower court disclosed that a question of constitutionality under the Fourteenth Amendment was properly raised upon such demurrer and decided, and the opinion was referred to by the Supreme Court of the United States as an *aid* in determining the ground of the decision where the record itself was insufficient.

In *Stone* v. *United States*, 164 U. S. 380, 41 L. ed. 477, it is said:

> "We are not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings."

In each of the above cases the opinion aided in determining the grounds of the decision, but in no one of these cases was the opinion allowed to refute or contradict the formal record, when the record showed something to have been done not borne out by the opinion.

That distinction is made by the case of *Memphis* v. *Cumberland Telephone & Telegraph Co.*, 218 U. S. 624, 54 L. ed. 1185. In that case the plaintiff's petition affirmatively disclosed that no claim was made that the statute was in violation of the Federal Constitution, although the court's opinion recited that a Federal question had been raised and decided. The Supreme Court of the United States, referring to the allegations of the petition, said:

> "It appears from an examination of the bill that it is distinctly charged therein that the ordinance was passed without authority of the state, and its attempted passage, it is alleged, was an abuse of power by the city. * * * The bill, therefore, so far from charging a violation of the 14th Amendment by an authorized action of the state, distinctly

> and in terms avers that the ordinance was passed without state authority."

Inasmuch as the Fourteenth Amendment protected only against unlawful state action, the bill upon its face did not raise a Federal question. The Supreme Court of the United States in that case held that the opinion, declaring a Federal question had been raised and passed upon, would not be allowed to refute the formal record.

In the case of *Bank of Commerce* v. *State of Tennessee*, 163 U. S. 416, 41 L. ed. 211, it was stated that the written opinion of the state court should not be confused with the judgment actually rendered. In that case the Supreme Court of the United States, in a rehearing, referring to its former decision, said:

> "The error consisted in mistaking a certain statement in a portion of the opinion of the court below for the judgment which it actually rendered."

And in the head notes the rule is stated:

> "No effect can be given to an abstract portion of the opinion upon which no judgment was rendered."

The court said that the opinion could be looked to only—

> "for the purpose of *discovering* the ground upon which the judgment of the court actually proceeded."

It has also been decided that where the record on its face shows that a Federal question was not necessarily involved, and shows that one was not raised, that the opinion of the lower court can be of no assistance and the court will not examine it. In such a case the opinion could only contradict the record.

Otis v. *Oregon Steamship Co.*, 116 U. S. 548, 29 L. ed. 719.

State v. *Board of Liquidation of Louisiana*, 98 U. S. 140, 25 L. ed. 114.

Moore v. *Mississippi*, 88 U. S. 636, 22 L. ed. 653.

As we take it, where the record in the case is clear and needs no aid from an examination of the opinion, then the opinion will not be resorted to. The opinion will not be given an effect contrary to the record, but will be used only as an interpretation and aid in a consideration of the record.

In this case the formal record of the judgment entered by the court has placed the decision upon one sole ground; —that the law is constitutional and that the assessments do not deprive the plaintiffs of their property without due process of law. We do not believe that the written opinion of the lower court can, nor do we believe it was intended by that court to, refute this formal record.

THE OPINION OF THE COURT, ESPECIALLY WHEN READ IN THE LIGHT OF THE JUDGMENT ENTERED, INDICATES AN INTENTION TO BASE THE DECISION ON THE ONE GROUND OF CONSTITUTIONALITY.

In Nebraska it is the syllabus and not the opinion by which the court is bound. This is contrary to the rule in some jurisdictions, and would make inapplicable the decision in *Burbank* v. *Ernst*, 232 U. S. 162, 58 L. ed. 551, holding that ordinarily head notes will be disregarded.

In *Holliday* v. *Brown*, 34 Neb. 232, the court says:

> "There is an unwritten rule in this court that the members thereof are bound only by the points stated in the syllabus of each case. Each judge in the body of an opinion necessarily must be permitted to

state his reasons in his own way, without binding the members of the court to assent to all such reasoning, although they may concur in the conclusions reached."

Although in the body of the opinion the matter of advertisements and of benefits of the law were discussed and the question was asked, whether the banks should now be heard to complain, neither of the terms "waiver" nor "estoppel" is mentioned, the opinion does not anywhere affirmatively base any decision upon that discussion, and the qualified wording of the syllabus, to our mind, is *significant*.

The third syllabus reads as follows (Rec. p. 59):

"Where a state bank has accepted the benefits arising from the deposits of money pursuant to the terms of the bank depositors' guaranty law, such bank should not be heard, in a proper case, to make complaint of a special assessment upon such deposits which has been levied for the benefit of the depositors' guaranty fund."

By this syllabus an abstract rule of law is stated, without a direct application to this particular case. The syllabus declares only that "in a proper case" the acceptance of benefits may prevent the bank from making complaint against assessments. It is obvious that the court was itself unwilling to be bound by that rule as decisive of this case and inserted the qualification "in a proper case" so that the utterance would amount to no more than an abstract statement of law. There is no positive assertion either in the syllabus or in the body of the opinion that this is a proper case within the rule, and that the rule is here applied.

What is said touching upon that subject in the body of the opinion is, first, a reference to what the president

of one of Nebraska's largest banks had said in a publication (Rec. p. 61); then reference to the publications made by some of the banks in 1926 (Rec. p. 61), and a statement that these advertisements were "calculated to attract favorable attention, and the patronage as well, of those having money for bank deposit"; then that a majority of the bankers in the state counted the bank guaranty depositors' fund

> "*in its conception*, a valuable asset, and many *predicted* that this beneficent plan would add greatly to the stability of the state banks."

The court then discusses and disposes of the constitutional question, holding that it is governed by the prior decisions of the Supreme Court of the United States and that the law is constitutional, and then returns to the other question and says

> "But it goes without saying that there never was nor could be any compulsion upon the state banks to accept deposits of money on the bank guaranty basis. But money was accepted by the state banks pursuant to the terms of the depositors' guaranty fund law. . . .
>
> "In view of the benefits arising from the deposits of large sums of money in state banks, pursuant to the terms of the bank depositors' guaranty fund, should the banks now be heard to make complaint of the special assessment of one-fourth of one per cent upon their deposits?"

To that question no answer is given. Had there been intention, even by the author of the opinion, to base decision upon it, a direct answer surely would have been given. It was unnecessary to affirmatively answer it, for the decision that the law was constitutional, just previously decided in the opinion, was determinative of the case, and the matter of waiver, after that conclusion

was reached, was an immaterial issue. We construe this to be only a general argument in the mind of the author of the opinion of the fairness of the decision already determined upon.

In the case of *Rogers v. Hennepin*, 240 U. S. 184, 60 L. ed. 594, a somewhat similar situation was presented. Suit was brought by the members of the Chamber of Commerce of the city of Minneapolis to enjoin the collection of assessments upon the membership, the contention being raised that the assessments were in violation of the Fourteenth Amendment. There were also non-Federal questions raised in defense. A similar case was at that time pending before the same court and had just been decided, holding that the assessments were not in violation of the Fourteenth Amendment. The Supreme Court of Minnesota referred to that case in its opinion and said:

"The decision in that case first herein controls this."

It was urged that so far as the record showed the decision of the state court of Minnesota may have been based on non-Federal ground as well as Federal grounds.

The Supreme Court of the United States construing the opinion of the Supreme Court of Minnesota said that the intention of the court was clear to base the decision upon the former decision which was decided upon the Federal question, and upon such determination found that the Supreme Court of Minnesota had based its decision by referring to the other case upon the sole ground of the Federal question and not upon non-Federal grounds. The court in the opinion said:

"The allusion to that decision as 'controlling' plainly meant that the court thought that all the

reasons urged for a different view were without merit, and that the present tax did not violate the 14th Amendment. It is well settled that where the state court does not decide against the plaintiff in error upon an independent state ground, but, deeming the Federal question to be before it, actually entertains it and decides it adversely to the Federal right asserted, this court has jurisdiction to review the judgment, assuming it to be a final judgment, as it is here.

In this case the intention of the court is likewise made clear by its opinion to base the decision upon the Federal ground, the court in its opinion stating that it is controlled by the former decisions of the Supreme Court of the United States on that question. We think the opinion itself discloses an intention to base the decision upon that sole ground.

A HOLDING THAT THE BANKS IN THIS CASE HAVING ACCEPTED THE BENEFITS ARISING FROM DEPOSITS SHOULD NOT BE HEARD TO COMPLAIN IF CONSIDERED TO BE A GROUND OF THE DECISION BY THE STATE SUPREME COURT IS A GROUND PALPABLY UNFOUNDED BOTH IN FACT AND LAW

The banks in Nebraska did not accept this law voluntarily. The record shows that when the statute was first enacted, a suit was carried by the banks through the Supreme Court of the United States attacking the validity of the law. It is the very judgment in that case which the appellees claim as against all of the banks, is res adjudicata here. When the law was declared valid the banks then had no election but to come under it, and to accept deposits under it, if they continued in the banking business.

For a great many years they operated under this law, supposing, as it was generally supposed by others, that the law would be successful in its operation. The actual test of this law did not occur until the crisis came and was realized. As soon as the banks understood that its successful operation was hopeless, that the scheme was bankrupt, that it was a liability instead of an asset, that it was an injury instead of a benefit, that it was depriving them of their property for no public good, and that it was taking away the protection of their own depositors, then they objected. At that time what election did they have but to object? Only a few of them could qualify to nationalize. They could not cease operation without disastrous effects upon themselves. Van F. Peterson, secretary of the Guaranty Fund Commission, testified that a solvent bank cannot close its doors and liquidate without losing in shrinkage of values an amount in extent equal to its total capital investment. When a bank closes, values go out of its assets (Rec. p. 100, Q. 150).

By the provisions of the law (Section 8029, Nebraska Statutes 1922) a failure to pay the assessments authorized the Attorney General to appoint a receiver. By the amendment of the law in 1925 (Session Laws 1925, Chapter 30, page 122) a failure to comply with the order of the department authorized the department to take possession of the property and business of the bank and place it in charge of the Guaranty Fund Commission.

And so the proposition which finally, under present conditions of operation, confronted the banks was that if they operated under the law they suffered an unconstitutional burden, and if they ceased to operate they sacrificed the values of their properties. When this con-

dition came and was understood, it is not claimed by the appellees that the banks have done anything then to waive their rights. The contention seems to be that since they operated under the law while they, as well as others, thought it was successful, that those previous acts have prevented them from taking a different position under changed facts and when they later found that it was injurious and amounted to an unconstitutional deprivation of property and property rights.

The facts in the case are undisputed, and any conclusion derived from those facts that the banks had waived their rights is an utterly unfounded and untenable conclusion.

All that is left for this court to decide is what conclusion is to be drawn from the given facts.

As we view it, what is contained in the opinion of the lower court with reference to the banks having waived their rights, if interpreted to mean that they have, is untenable in its conclusion and is utterly insufficient to support the judgment and decision in the case, and therefore does not detract from our proposition that the decision in the lower court must be considered to have been based upon the sole ground of a determination of the Federal question.

The question of waiver or estoppel may be a question of mixed law and fact, although we cannot see but that it is a pure question of law in this case because the record presents no issuable facts.

Where the decision of the lower court upon a non-Federal ground is untenable either in law or fact, and a Federal right has been denied, the Supreme Court, as we understand it, will examine into the non-Federal ques-

tion and eliminate it as not being a valid basis for the lower court's decision.

IT IS PROPER THAT THE COURT EXAMINE AND ANALYZE THE FACTS IN THIS CASE PERTAINING TO THE QUESTION OF WHETHER A FINDING OF WAIVER OR ESTOPPEL IS WITHOUT SUPPORT AND UNTENABLE.

In *Cresvill* v. *Grand Lodge K. of P.*, 225 U. S. 246, 261, 56 L. ed. 1074, 1080, the court announced the following rule:

> "(a) where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support, and the evidence is in the record, the resulting question of law is open for decision; and (b) where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to cause it to be essentially necessary, for the purpose of passing upon the Federal question, to analyze and dissect the facts, to the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."

In that case a fraternal lodge, incorporated by act of Congress, was by the lower court enjoined from exercising its charter rights and using its own emblems, on the ground that a complaining fraternal lodge, by the same name and using the same emblems, had exclusive rights thereto. The lower court thus denied the rights of the lodge incorporated by Federal law, and held that the complaining lodge had not lost its right by laches. The Supreme Court examined the evidence in the case, reversed the decision of the lower court, and held there could be no other legal conclusion in the case as applied to the facts but that laches did exist. This gave protection to the Federal right.

A similar case, following and approving the last cited decision and applying the same doctrine, is Recent *Egyptian Arabic Order of Nobles of the Mystic Shrine v. Mechanics*, 279 U. S. 737, 73 L. ed. 931.

In that case the Supreme Court of the United States reviewed the evidence on the question of acquiescence and laches and said:

> "It is our province to inquire not only whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-federal ground of decision having no fair support."

And the court said, with reference to its own finding on laches:

> "It is apparent that had this view of the question of laches prevailed in the state court the federal right set up by the negro order must have been sustained."

In the case of *Postal Telegraph Cable Company v. Newport*, 247 U. S. 464, 62 L. ed. 1215, the court had before it the question of the constitutionality of a city ordinance, imposing a license tax on the telegraph company of $100.00 a year. The contention made by the company was that the tax was a burden on interstate commerce, discriminatory, unreasonable in amount and denied the equal protection of the law in violation of the Fourteenth Amendment.

The lower court held that the company had accepted the provisions of the ordinance and had become bound by it as a contract, and that this had, furthermore, been determined in a former suit which was *res judicata* of the question. Arriving at these conclusions on the non-Federal grounds, the lower court did not pass upon the Federal question.

The Supreme Court of the United States reviewed the non-Federal grounds, holding that the evidence was insufficient to show that the company had accepted the ordinance so that it had become a binding contract; also holding that the former court's decision on *res judicata* was erroneous, since the complaining company was not in privity with the company which was a party to the prior litigation in which the judgment claimed as a bar was entered. In passing upon the sufficiency of the holding on the non-Federal grounds, the Supreme Court said:

> "But the question arises, whether the basis of fact upon which the state court rested its decision denying the asserted Federal rights has any support in the record; for if not, it is our duty to review and correct the error. * * *
>
> "*Res judicata*, like other kinds of estoppel, ordinarily is a matter of state law, and as the decision of the state court in this case in effect rests upon that ground, this of itself would be sufficient to sustain the judgment against reversal in this court, except for two queries that must first be answered: (a) Is the question of state law, in this case, independent of the Federal questions? and (b) Is the decision reached upon that point sufficiently well founded to furnish adequate support for the judgment?"

And the court concluded as to the holding of the lower court on the non-Federal grounds that:

> "We are of the opinion that the decision reached upon it is so clearly ill-founded that it cannot sustain the judgment."

The court therefore held that the Federal right was subject to review, and remanded the case for the purpose of having evidence taken necessary for proper disposition of the Federal question.

In *Davis* v. *Wechsler*, 263 U. S. 22, 68 L. ed. 143, the court said:

> "If the Constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds."

And in *First National Bank* v. *Hartford*, 273 U. S. 548, 71 L. ed. 767, the rule is thus stated:

> "In a case taken to the Supreme Court of the United States from a state court for review, on the ground that a Federal right was denied, that court is not concluded by a finding of the state court that the asserted right is without basis in fact."

Where the Federal right has been denied as a result of a finding shown by the record to be without evidence to support it, or where the conclusions of law as to Federal right and the findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, the court will analyze the facts.

Northern Pacific R. Co. v. *North Dakota, ex rel. McCue*, 236 U. S. 585, 59 L. ed. 735.

In *Truax* v. *Corrigan*, 257 U. S. 312, 66 L. ed. 254, where the facts were set forth in a petition, to which a demurrer was interposed, the court said that it would analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the highest state court in that regard, and in the opinion the court said:

> **"The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiffs' legal rights under the 14th Amendment, we are at as full liberty to consider them as**

> was the state supreme court. * * * In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here."

WHERE THE CONCLUSION OF LAW OF THE STATE COURT ON A NON-FEDERAL QUESTION AS APPLIED TO THE FACTS IS CLEARLY WRONG, A DECISION OF THE LOWER COURT, BASED IN PART UPON SUCH CONCLUSION, WILL NOT BAR THE SUPREME COURT FROM THE REVIEW OF A FEDERAL QUESTION PRESENTED IN THE CASE.

A holding in this case that the banks, by an acceptance of past benefits under the law, have waived their rights to raise the constitutional question, is untenable as a proposition of law and the non-Federal ground for that reason is open to review by the Supreme Court and, if found untenable, will be excluded as being no valid basis for the decision.

In the case of *Ward* v. *Love County*, 253 U. S. 17, 64 L. ed. 751, suit was brought to enjoin the collection of taxes assessed against Indian lands, claimed by the defendant Indians to be exempt from taxation under Federal law.

The lower court held that there was a waiver of the constitutional question, holding that the Indians had

voluntarily paid the taxes in spite of the fact that these taxes were collected under coercive means.

The Supreme Court refused to be bound by that conclusion and held that the finding of the lower court that the taxes were paid voluntarily was "without any fair or substantial support," and the court in the opinion said:

> "It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support. * * * Of course, if non-Federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. *Terre Haute & I. R. Co.* v. *Indiana*, 194 U. S. 579, 589, 48 L. Ed. 1124, 1129, 24 Sup. Ct. Rep. 767. With this qualification, it is true that a judgment of a state court, which is put on independent non-Federal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one, and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."

In the case of *Union Pacific R. Co.* v. *Public Service Commission*, 248 U. S. 67, 63 L. ed. 131, a state statute, imposing a license fee upon corporations for the privilege of issuing securities, was held void as an unlawful interference with interstate commerce. The railroad company attacking the law, desiring to issue bonds in the amount of over $31,000,000.00, had paid a license fee of over $10,000.00 to the State Board, under protest, for a permit and had acted upon the permit granted.

The lower court held that having invoked its provisions and having procured a grant of authority under it, the corporation was estopped and had waived its right to question the constitutionaliy of the law.

The Supreme Court, in reviewing this decision on the non-Federal ground, held that the action of the corporation in procuring the grant was not wholly voluntary; that the company had no election and was forced to submit to the provisions of the law in order to procure the privilege for something necessarily incident to its proper continuance and operation. The court said:

> "Of course, it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called."

In reversing the state court and in discussing the non-Federal question the Supreme Court of the United States said:

> "The supreme court of the state avoided this question by holding that the application to the Commission was voluntary, and hence that the railroad company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this court. But the later decisions show that such is not the law, and that, on the contrary, it is the duty of this court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the Federal right has been waived. *Creswill* v. *Grand Lodge K. P.*, 225 U. S. 246, 56 L. ed. 1074, 32 Sup. Ct. Rep. 822. Were it otherwise, as conduct under duress involves a choice, it always would be possible for a state to impose an unconstitutional burden by

the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was attempted in *Hudson, I. & S. P. R. Co. v. O'Connor*, 223 U. S. 280, 56 L. ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050.

The reasoning in that case and in the other cases herein last previously cited are directly analogous to the case here. The banks were put to it to choose between the lesser of two evils, that of going out of business entirely and sacrificing values or of enduring and carrying an unconstitutional burden. The penalty of the statute was that for failure to pay assessment they be placed in receivership, or that they be taken charge of and turned over for operation to the Guaranty Fund Commission. So far as that burden has been carried since conditions have come about whereby the burden has, by reason of the operation of the law, become an unconstitutional one, cannot be said to have been voluntarily carried by the banks, or can it be said that any action of theirs under the law has been such as to amount to a waiver of their rights.

IF A BANK HAS ENCOURAGED DEPOSITS TO BE MADE WITH IT, ITS FIRST DUTY MUST BE TO ITS OWN DEPOSITORS. HOW, THEN, COULD IT BE ESTOPPED BY ITS ACT OF ENCOURAGING DEPOSITS IN ITS BANK FROM LATER PROTECTING THE VERY DEPOSITORS WHICH IT HAD THUS PROCURED.

If the banks in Nebraska have at any time, by stressing advantages of the Bank Guaranty Law, when they thought the law was of benefit to their depositors, and by that action have encouraged deposits in their banks, their first duty is to those depositors; their own depositors. When they learn, by development of conditions,

that further contribution to the Guaranty Fund is injurious to the protection of those depositors, can it be said that they have waived their right to assert this for their protection? Any encouragement that they may have given to prospective depositors could have been upon the assurance that such deposits in their banks were safe. It would be their duty to make them safe. When they find that the payment of assessments by their bank depletes their own assets, takes from the protection of their own depositors to pay another class of depositors, those in failed banks, insecures their own depositors, is injurious to the rights of their own depositors, can it be possible that these banks upon a discovery of the facts, are then estopped because of prior assertions made to make the assertion that the Bank Guaranty Law is injurious, and to take action for the protection of their own banks and their own depositors? In fact, as we view it, it is their *duty* to take such action. Whenever such a bank discovers that the Bank Guaranty Law is no longer a protection but works an injury rather than a benefit, it must be the duty of the bank to disclose that fact to its depositors and to work against the depletion of its own funds, which would result by contributions under such a law.

CONDUCTING BUSINESS UNDER THE GUARANTY FUND LAW WOULD NOT ESTOP THE BANKS FROM QUESTIONING THE VALIDITY OF SPECIAL ASSESSMENTS WHEN THE SAME BECAME CONFISCATORY OR UNCONSTITUTIONAL.

Allen v. St. Louis, I. M. & S. R. Co., 230 U. S. 553, 57 L. ed. 1625.

Union Pacific R. Co. v. Public Service Commission, 248 U. S. 67, 63 L. ed. 131.

THE BANKS, BEING QUASI PUBLIC INSTITUTIONS, AND SO DECLARED BY LAW, BY REASON OF THEIR DIRECT RELATION TO THE PUBLIC WELFARE, CANNOT WAIVE THEIR RIGHT TO EXIST.

The rule is stated in 27 R. C. L. p. 907, as follows:

> "A waiver is not, however, allowed to be operative where it would infringe upon the rights of others, or would be against public policy or morals. Where the object of a law is the good of the public as well as of the individual, such protection to the state cannot, at will, be waived by any individual, an integral part thereof. The fact that the individual is willing to waive his protection cannot avail. The public good is entitled to protection and consideration; and if, in order to effectuate that object, there must be enforced protection to the individual, such individual must submit to such enforced protection for the public good."

With regard to quasi public corporations having public duties to perform, the rule is—

13 Corpus Juris, p. 444:

> "The general rule has been laid down that any contract of a corporation by which it disables itself from performing its duties to the public, or subordinates to its private interests the rights and conveniences which it impliedly undertakes to secure to the community, is invalid as contrary to public policy."

CONCLUSION.

For the reasons above given we submit that the decision of the Supreme Court of the State of Nebraska is erroneous and should be reversed and the injunction allowed.

Respectfully submitted,

FRANK H. GAINES,
LEONARD A. FLANSBURG,
S. S. SIDNER,
Attorneys for Appellants.